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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912-1913

No. ~~888~~ 385

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND FEDERAL SUGAR REFINING COMPANY, APPELLANTS,

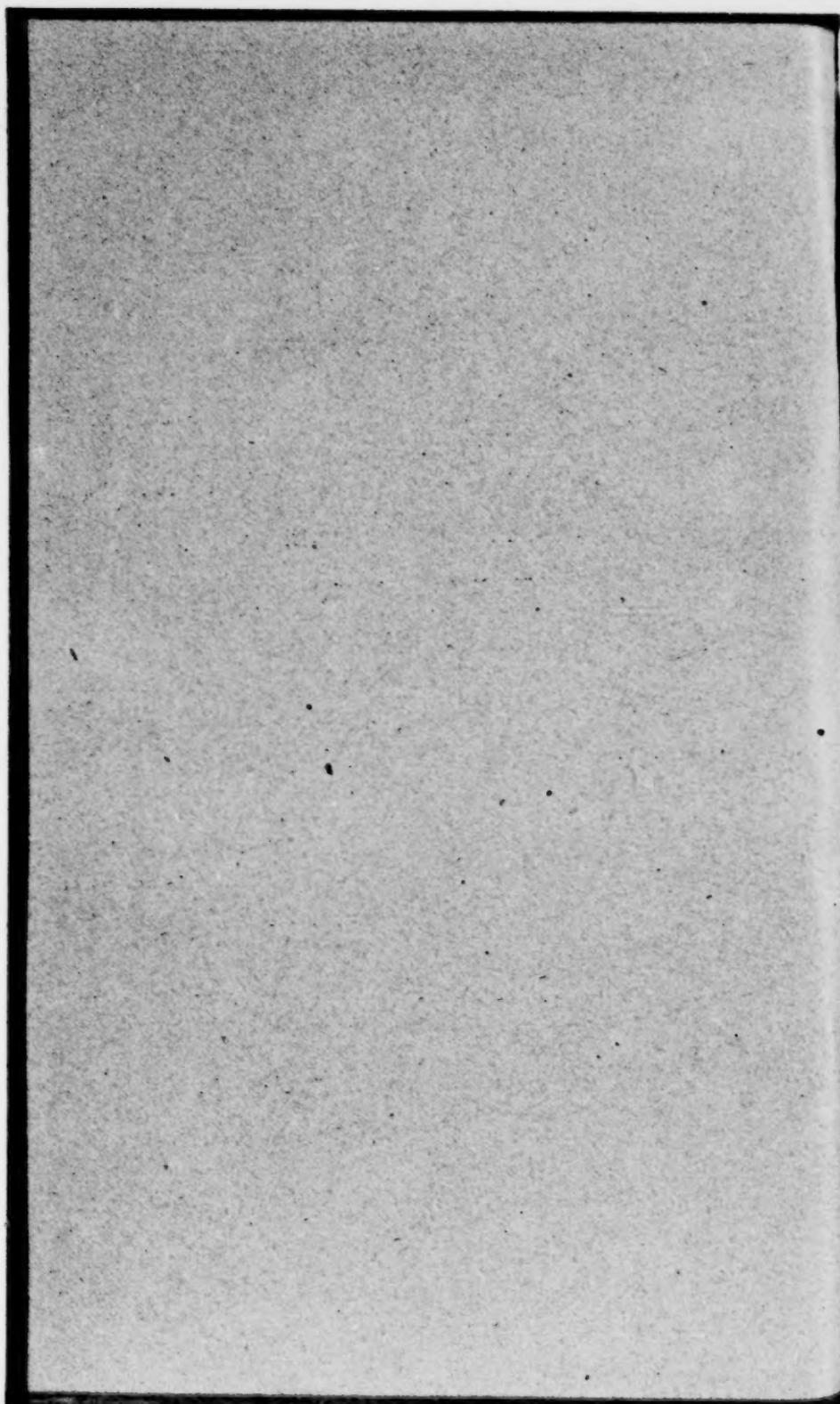
vs.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED NOVEMBER 20, 1912.

(23487)



SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1912.

No. 862.

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND FEDERAL SUGAR REFINING COMPANY, APPELLANTS,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY, THE CENTRAL
 Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, New York, Ontario and Western Railway Company, and The Pennsylvania Railroad Company, petitioners; Brooklyn Eastern District Terminal, John Arbuckle and William A. Jamisen, intervening petitioners.

No. 38.

v.s.

UNITED STATES, RESPONDENT; INTERSTATE COMMERCE
 Commission, Federal Sugar Refining Company, intervening respondents.

UNITED STATES OF AMERICA, etc.

Be it remembered that in the United States Commerce Court, in the city of Washington, District of Columbia, at the times herein-after mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Commerce Court of the United States.

Petition for injunction, etc.

Filed April 12, 1911.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; THE ERIE RAILROAD COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY; AND THE PENNSYLVANIA RAILROAD COMPANY, petitioners,

} May session, 1911.
 No. 38.

v.

UNITED STATES, RESPONDENT.

To the judges of the Commerce Court of the United States:

The Baltimore and Ohio Railroad Company, a corporation of the State of Maryland, the Central Railroad Company of New Jersey, a corporation of the State of New Jersey, the Delaware, 2 Lackawanna and Western Railroad Company, a corporation of the State of Pennsylvania, the Erie Railroad Company, a corporation of the State of New York, the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, the New York, Ontario and Western Railway Company, a corporation of the State

of New York, and the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, bring this, their petition for an injunction against the enforcement of and a decree setting aside and annulling a certain order of the Interstate Commerce Commission, made on the fifth day of December, 1910, and more particularly mentioned hereinafter, and thereupon your petitioners complain and say:

1. That your petitioners are engaged in the transportation of passengers and property by railroad from one State to another and in respect of such transportation are therefore subject to the various acts enacted by the Congress of the United States regulating and affecting interstate transportation of the character mentioned in said acts, insofar as those acts are not repugnant to the Constitution of the United States and therefore invalid.

2. That the Interstate Commerce Commission is a commission created and established by and which now exists under and by virtue of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, and various other acts amendatory thereof and supplementary thereto.

3. That your petitioners' railroads all have their rail termini upon the New Jersey shore of the Harbor of New York, except the Baltimore & Ohio Railroad Company, whose rail terminus is at St.

3. George, Staten Island, and the Pennsylvania Railroad Company, whose rail terminus for passenger traffic only is in the Borough of Manhattan. In order to reach the shipping territory of Greater New York across the Hudson and East Rivers, and other waters, your petitioners have been compelled to serve the vast shipping interests of Greater New York City by means of floats, lighters, and barges.

Your petitioners have established a lighterage zone (known as the lighterage limits), which has been in effect for several years, and during that time has been and is now described in the tariffs of each of your petitioners, which tariffs have been and are duly filed with the Interstate Commerce Commission, as follows:

"North River: New York side, Battery to 135th Street, New Jersey side, Jersey City, N. J., to and including Fort Lee, N. J.

"East River and Harlem River: New York side, Battery to Jerome Avenue Bridge, including Harlem River side of Wards and Randalls Islands. Brooklyn side, from Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal west of Washington Avenue Bridge, and to Hamilton Avenue Bridge, Gowanus Canal, to and including 69th Street, South Brooklyn (Bay Ridge).

"New York Bay: Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive and include Shooter Island. Points on the New Jersey shore of New York Bay and on the Kill von Kull, between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, Staten Island."

4 Within said lighterage limits your petitioners perform without additional charge a lighterage service on eastbound shipments from their rail terminals upon the western shore of New York Harbor to points within those limits, and on westbound shipments from points within those limits to their rail terminals upon the western shore of New York Harbor.

Within said lighterage limits and at various points within the Boroughs of Manhattan and Brooklyn, city of New York, each of your petitioners has established, and for several years has maintained and still maintains, freight terminal stations, at which it delivers eastbound freight and receives westbound freight for transportation over its lines. Each of your petitioners has some freight terminal stations as aforesaid which it owns and directly operates, and others which are operated for it under and pursuant to the provisions of certain contracts between it and the owners of said terminal stations. In some instances a single terminal station is operated for and on behalf of two or more of your petitioners under and pursuant to several contracts between them and the owner of said station; and in such instances said terminal station is a union terminal for two or more of your petitioners.

It is impossible for your petitioners to deliver and receive all freight, especially carload freight, at said terminals. A large part of it must of necessity be delivered and received at public and private docks within the said lighterage limits. Accordingly your petitioners have for several years received and delivered freight at all steamship piers, docks, or landings, and private piers or landings when shippers or consignees arrange for the receipt or delivery

5 of freight within the lighterage limits and have lightered it without additional charge from and to said points, and still do so receive, deliver, and lighter it.

Your petitioners transport between said terminal stations, piers, docks and landings, and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the point of destination, and for the flat New York rate by means of lighters, floats, and barges, owned and directly operated by them or operated for them under contracts between them and the owners of such equipment, freight received at or destined to said terminal stations, piers, docks, and landings. Your petitioners for several years past have held and now hold themselves out as common carriers to and from all said points within the lighterage limits, both by their practice of receiving and delivering freight at said points, and by their tariffs, which are now and for several years past have been duly published and filed with the Interstate Commerce Commission. The liability under their respective bills of lading attaches to your petitioners on westbound shipments from the time the freight is received at such terminal station, dock, pier, or landing and ends on eastbound shipments when delivered into the hands of the consignee at such terminal station, pier,

dock, or landing. The bill of lading issued by your petitioners for freight so received or delivered by them by its terms covers and includes the lighterage movement.

4. Among other terminal freight stations established by your petitioners within the said lighterage limits is the Jay Street Terminal.

The Jay Street Terminal is located at the foot of Bridge Street, Brooklyn, on the East River, having a water frontage of 1,200 feet and a depth of 600 feet. Its equipment consists of a large 6 freight house, two Baldwin locomotives, three tug boats, two steam lighters, eleven barges, and nine car floats. The capacity of the yard is 235 cars.

The Jay Street Terminal is a union freight terminal for all your petitioners and is designated as a regular public freight terminal of your petitioners in their tariffs duly filed with the Interstate Commerce Commission. It is owned by a copartnership composed of William A. Jamison and John Arbuckle, conducting such freight terminal as a separate business under the name and style of Jay Street Terminal under certificate filed with the clerk of New York County in accordance with the law of the State of New York, and is operated as a freight station for your petitioners under and pursuant to several contracts between your petitioners and the Jay Street Terminal, which contracts are substantially identical in their terms and provisions; a copy of one of said contracts, being representative of them all, is hereto attached and marked Exhibit "A."

Under and pursuant to said contracts the Jay Street Terminal acts as the agent of your petitioners in the receipt, handling, and delivery of freight at said terminal and the transportation thereof between said terminal and the rail terminals of your petitioners on the western shore of New York Harbor.

Under and pursuant to said contracts, the said Jay Street Terminal lighters or floats eastbound freight from the rails on the western shore of New York Harbor to the docks, wharves, and float bridges at Brooklyn, and there unloads it from said lighters or floats and delivers it to the consignees; it receives westbound freight from the shippers and lighters or floats it to the said rails. It assumes full responsibility on all freight while in its possession on behalf

7 of your petitioners and agrees to indemnify your petitioners for all moneys paid out to consignees or to consignors for loss or damage to freight while in its possession. It is agreed that a competent superintendent shall be kept upon the premises who shall carry out the directions of your petitioners, and said superintendent has authority to issue bills of lading on behalf of each of your several petitioners for westbound freight and to sign the same as agent of your petitioners, which is done, and the said Jay Street Terminal agrees to be responsible for all claims, injuries, or damages arising from their improper issuance. It also agrees to be responsible for and pay to your petitioners all freight charges on eastbound freight and all freight charges payable in advance on westbound freight, and accordingly collects and accounts for the same.

It agrees to insure against loss or damage by fire or marine risks all freight, cars, or property while in its possession, received by it under the provisions of said contracts, said insurance to be for the benefit of your petitioners and others as their interests shall appear. It also agrees to enforce the car-service regulations of your petitioners as established from time to time and filed and published in accordance with the act to regulate commerce and the amendments thereof and supplements thereto. It performs the movement in either direction of empty cars between the Jay Street Terminal and your petitioners' terminals on the west shore of New York Harbor; issues waybills and performs other necessary clerical services, and in general furnishes all facilities and performs all work and services required for the receipt or delivery of freight as at any public station of your petitioners, and for the transportation of said freight between the Jay Street Terminal and your petitioners' terminals on the west shore of New York Harbor.

8. In consideration of these services each of your petitioners has agreed to pay its said agent, the Jay Street Terminal, a compensation which is arrived at as follows, to wit:

On freight handled by its said agent originating at or destined to points west of the western termini of your petitioners (that is, west of trunk line territory, which embraces in general all that portion of the United States lying north of the Potomac and Ohio Rivers, and east of Buffalo and Salamanca, New York, and Pittsburgh, Pennsylvania), four and one-fifth cents per hundred pounds, and on freight originating at or destined to points east thereof, three cents per hundred pounds, with certain exceptions noted in said Exhibit "A."

The Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn. It is the only convenient and accessible freight station of your petitioners for the shippers of that territory. When it became necessary several years ago for your petitioners to establish and operate public freight terminals for the service of the said territory, they had no choice but to enter into a contractual arrangement with the owner of the Jay Street Terminal for the operation of said terminal as a public freight station of your petitioners. The price of the water front property in that section was so high as to be prohibitive. No independent terminals other than the Jay Street Terminal were conveniently accessible to the shippers of that territory. In no other practicable way could your petitioners in the past, nor can they at present, serve

the large and important shipping interests of this section 9. of Brooklyn, than by the maintenance of the Jay Street Terminal as a public freight station of your petitioners under and pursuant to said contracts.

5. That the said Arbuckle and Jamison operate a sugar refinery in the borough of Brooklyn, located upwards of a block from the Jay Street Terminal. Such shipments are carted from and to the

terminal by said Arbuckle and Jamison and handled at the terminal in the same way as the freight of hundreds of other shippers and the freight charges thereon are collected from the said Arbuckle and Jamison by the Jay Street Terminal in accordance with the regularly published tariff of your petitioners. That approximately four-fifths of the shipments of sugar made by Arbuckle and Jamison through said Jay Street Terminal are sold by said Arbuckle and Jamison f. o. b. Brooklyn and become the property of the consignee immediately upon delivery to the terminal which is upon loading into cars at the terminal as to all carload shipments. That during the first six months of 1907, the bills of lading issued by the Jay Street Terminal for shipments of general merchandise numbered 92,622, of which 3,969 were for Arbuckle and Jamison sugar and 1,210 for Arbuckle and Jamison coffee and the shipments and receipts of said Arbuckle and Jamison constituted less than one-third of the total tonnage moving through the terminal. That during the same period the number of different consignees who received freight at the terminal was about 765 and the number of different shippers through the terminal about 560. That the profits in the operation of the Jay Street Terminal on all shipments during the same period amounted to less than 3% on the investment, without making any allowances for depreciation or interest.

10. 6. That the Federal Sugar Refining Company is a corporation of the State of New York, having its executive offices at 138 Front Street, in the city of New York, and having its refineries from which it ships all its outbound products, including sugar, and at which it receives all its inbound supplies for the manufacture of sugar and commodities allied thereto, on the east bank of the Hudson River, within the corporate limits of the city of Yonkers, and more than ten miles distant from the northernmost boundary of the lighterage limits of your petitioners as heretofore set forth and defined. The said refineries are located on the line of the New York Central and Hudson River Railroad Company, with which they have switch connections and over which the Federal Sugar Refining Company ships the greater part of its output and receives a large part of its inbound shipments. Over this railroad, with few exceptions, the rates to points in the shipping territory of the Federal Sugar Refining Company are the same as the rates from the Jay Street Terminal over the lines of your petitioners. That in order to make shipments of its sugar from Yonkers via the lines of your petitioners at the New York rate the Federal Sugar Refining Company must deliver such shipments to the New York Central and Hudson River Railroad Company at Yonkers, thence to be transported by that railroad to New York and there delivered to your petitioners at points within the lighterage limits. Because of alleged delay in the handling and transportation of such shipments via the route aforesaid, the Federal Sugar Refining Company prefers to deliver said shipments directly to your petitioners by lighter within the lighterage limits. Prior to July, 1909, the Federal Sugar Refining Company of

11 Yonkers, the predecessor of the Federal Sugar Refining Company, was accustomed to deliver its shipments at Yonkers to the Ben Franklin Transportation Company, which transported the same direct to the terminals of your petitioners on the west shore of New York Harbor, at a charge to the Federal Sugar Refining Company of Yonkers of three cents per hundred pounds.

In the month of May, 1907, the Federal Sugar Refining Company of Yonkers filed a complaint with the Interstate Commerce Commission against your petitioners, alleging that the complainant through the Ben Franklin Transportation Company performed the same service on its shipments of sugar as were said to be performed by the Brooklyn Eastern District Terminal on shipments of the American Sugar Refining Company and by the Jay Street Terminal on shipments of the Arbuckle Brothers (Arbuckle & Jamison); that the lighterage limits prescribed by your petitioners were unduly discriminatory in that they did not extend to Yonkers and include the refinery of the Federal Sugar Refining Company of Yonkers, and permitted allowances to be made on shipments of sugar from the refineries of Arbuckle Brothers and the American Sugar Refining Company, while not so permitting on the complainant's shipments, because the latter was located outside the prescribed limits. Said practice was said to result in unjust discrimination and undue prejudice, and to oblige the complainant to pay unreasonable rates. A copy of said complaint is hereto annexed and marked Exhibit "B." A copy of the answer filed by one of your petitioners is hereto annexed and marked Exhibit "C," and is representative of the answers filed by all of your petitioners. Hearings were held

12 thereafter, and on the 24th day of June, 1909, in the aforesaid proceeding known as Docket No. 1082, the said Interstate Commerce Commission made its report and order, a copy of which is hereto annexed and marked Exhibit "D." The said report and order of the Interstate Commerce Commission in Docket No. 1082 was to the effect that said complaint should be dismissed because the extension of your petitioners' lighterage limits in New York Harbor was a matter of business discretion and that said commission had no authority to require such extension beyond the then prescribed boundaries, and that complainant being located outside of the prescribed lighterage limits was not subjected to unlawful discrimination by reason of the practice of your petitioners in affording free lighterage on shipments originating at or destined to points within said lighterage limits, while refusing to so afford on complainants' shipments.

As a device to appear to ship from within the lighterage limits, within a month after the issuance of said report and order, a new corporation known as the "Federal Sugar Refining Company" was organized, which established its principal office at 138 Front Street, New York City, and took over the refineries heretofore mentioned in the city of Yonkers, and adopted the following practice: Contracts of sale or orders for sugar were received at 138 Front Street and each of said orders was given a separate contract num-

ber and said order bearing the contract number was forwarded to the refinery where the order was filled and the barrels or bags were stamped with the contract number and placed on a lighter. The shipment bearing the contract number remained intact until it reached the hands of the buyer. The refinery received shipping in-

13 structions from 138 Front Street, and these shipping instructions showed the contract number, the ultimate destination and the rail line over which the shipment was to be transported.

The captain of the lighter of the Ben Franklin Transportation Company gave a receipt to the refinery and received from the refinery a so-called bill of lading which was no more than a form of railroad bill of lading filled in by the Federal Sugar Refining Company and designating a consignment to the Federal Sugar Refining Company, 138 Front Street, New York City, to be transported by the Ben Franklin Transportation Company and showing the contract number with which the shipment had been marked. The said document or alleged bill of lading was not signed by the Ben Franklin Transportation Company through any of its officers, or the captain of the lighter or by any other carrier. There was nothing in any of the documents which called for transportation to Pier 24, North River. The said shipping instructions sent from 138 Front Street to Yonkers were to ship to "Federal Sugar Refining Company, 138 Front Street, City, B. F. T. Co. (B. & O.)" or other initials representing the Ben Franklin Transportation Company and one of your petitioners as the case may have been. That none of your petitioners could or did perform any transportation service in connection with the Ben Franklin Transportation Company between Yonkers and 138 Front Street, and such shipping instructions were in fact directions to deliver said shipments to the Ben Franklin Transportation Company to be lightered and delivered to one of your respondents at its terminal on the west shore of New York Harbor. The practice has been for the lighter of the Ben Franklin Transportation Company to go to Pier 24, North River, New York, part of which pier is leased to the

14 Ben Franklin Transportation Company, where the captain of the lighter called up the office of the Federal Sugar Refining

Company, at 138 Front Street, and reported the particular shipment then on his lighter. The captain of the lighter was then handed a form of bill of lading not signed by any of your petitioners, and showing the name and address of the consignor as the Federal Sugar Refining Company, 138 Front Street, New York, Franklin Street Pier, 24, North River. The lighter then proceeded to the rail terminus of such of your petitioners as had been previously designated in the shipping instructions sent to Yonkers, and there delivered the shipment to such petitioner and obtained the signature of your petitioner's agent at said terminus upon the form of bill of lading theretofore prepared and delivered to said captain as aforesaid, and said bill of lading was stamped by the said petitioner's agent to show the receipt of the shipment at said station on the west shore of New York Harbor.

That such shipments were handled under contract between the Ben Franklin Transportation Company and the Federal Sugar Refining Company for a compensation of three cents per hundred pounds, although the said contract provides for a compensation of four cents per hundred pounds on sugar lightered from Yonkers to Pier 24, North River, payments for said service being made to the Ben Franklin Transportation Company under that provision of said contract which provides for a compensation of three cents per hundred pounds for sugar lightered from Yonkers to your petitioners' rail termini.

8. That having established the practice hereinbefore described, the said Federal Sugar Refining Company filed a complaint in October, 1909, with the Interstate Commerce Commission

against your petitioners, a copy of which together with a copy

15 of the answer of one of your petitioners as representative of the answers filed by all of your petitioners are hereto annexed and marked Exhibits "E" and "F," respectively. Said complaint alleged in substance that the interstate transportation of the product of the said Federal Sugar Refining Company began at Pier 24, North River, Borough of Manhattan, a point within the lighterage limits as aforesaid, and that said Jay Street Terminal is owned and conducted by copartners, named John Arbuckle and William A. Jamison, which said copartners owned, maintained, and operated in connection therewith a sugar refinery at the foot of Jay Street, Borough of Brooklyn. Also that said amounts of three cents per hundred pounds and four and one-fifth cents per hundred pounds were paid to said copartners for the lighterage of their sugar from Jay Street, Brooklyn, to the rail termini of your petitioners on the west bank of New York Harbor, and that inasmuch as the said Federal Sugar Refining Company was a competitor of the said Arbuckle and Jamison in the sugar business it constituted an undue and unreasonable prejudice and disadvantage against said Federal Sugar Refining Company to pay said amounts of three cents and four and one-fifth cents per hundred pounds for the handling of sugar to said Arbuckle and Jamison and not to pay similarly to the said Federal Sugar Refining Company.

9. That hearings were had before the Interstate Commerce Commission upon the last-mentioned complaint on the 25th day of February, 1910, and on the 13th day of April, 1910; and subsequently, to wit, on the 6th day of March, 1911, the Interstate Commerce Commission issued its report and order against your petitioners, being

16 the order first hereinabove referred to, a copy of which report and order is hereto attached and marked Exhibit "G,"

requiring your petitioners to cease and desist on or before the fifteenth day of April, 1911, and for a period of not less than two years thereafter, to abstain from paying what the said Interstate Commerce Commission has termed allowances to said John Arbuckle and William A. Jamison, copartners trading under the firm name of Arbuckle Brothers, on the sugar of the latter, while at the same

time paying no such allowances to said Federal Sugar Refining Company on its sugar, which so-called allowances were found by the Interstate Commerce Commission in its said report to be unduly discriminatory and in violation of the act to regulate commerce.

10. That the commission erred in finding in said report and order that the practice of stopping the lighter at Pier 24, North River, en route from Yonkers to Jersey City or other terminal of one of your petitioners, as above described, is different in substance or in legal effect from the practice formerly followed by the Federal Sugar Refining Company of having shipments lightered direct from Yonkers to such terminal, and differentiates the present case from that formerly before the commission in Docket No. 1082, and in holding that by reason of the stoppage of such lighter at Pier 24, North River, the shipments of the Federal Sugar Refining Company originated within lighterage limits.

11. That the commission erred in finding in said report and order that your petitioners refused to bear the burden of lighterage across the river sugar for the Federal Sugar Refining Company, inasmuch as your petitioners now and at all times referred to in this petition

hold themselves out, and have held themselves out, as ready
17. to accept shipments of the Federal Sugar Refining Company
at any point within the lighterage limits and to lighter the
same to their respective terminals on the western shore of New York
Harbor at their own expense.

12. That the commission erred in finding in said report and order that Arbuckle Brothers delivered their shipments to your petitioners on the Jersey shore at their own risk, and that at that point and time the liability of your petitioners as common carriers commenced, and that up to that point there is no transportation of the sugar, but only an accessory service by Arbuckle Brothers in delivering their own shipments to the carrier for transportation. That such sugar of Arbuckle Brothers is in fact covered by the bill of lading of one of your petitioners from the time that it is delivered to the Jay Street Terminal for shipment, and the petitioner whose bill of lading is thus issued is legally liable, if the bill of lading be an order bill of lading to the lawful holder thereof, and if it be a straight bill of lading to the consignee or owner of the shipment, who in either case may be and generally is a party other than Arbuckle Brothers from the time of such delivery to the Jay Street Terminal. That such lighterage and terminal service performed by the Jay Street Terminal is not an accessory service but a service connected with and a part of the transportation and the furnishing of instrumentalities used therein, inasmuch as such service and the furnishing of such instrumentalities is covered by the tariffs of your petitioners on file with the Interstate Commerce Commission, and is a service which your petitioners hold themselves out as common carriers to

18. perform under such tariffs and by their general practice, and
which may lawfully be performed by the owner of property

with respect to his own property for a just and reasonable compensation paid by the carrier.

13. That the commission erred in its report and order in holding that your petitioners may not lawfully employ, for public station facilities, the facilities owned and operated by a shipper and make reasonable compensation therefor to the owner thereof without at the same time permitting other shippers to perform a similar service for the same compensation.

14. That the commission erred in its report and order in finding that Arbuckle Brothers and the Federal Sugar Refining Company provide similar facilities and perform the same service in the transportation of their property to the terminals of your petitioners on the western shore of the Hudson River.

15. That the commission erred in its report and order in finding that the contractual arrangement between your petitioners and the Jay Street Terminal saves Arbuckle Brothers the expense of teaming or conveying their traffic to a public terminal.

16. That the commission erred in finding in its report and order that your petitioners make an allowance to Arbuckle Brothers for the lighterage of their sugar. All payments made by your petitioners to the Jay Street Terminal are made on account of all the services performed and the facilities furnished by the Jay Street Terminal, and the payments of three cents and four and one-fifth cents per hundred pounds, in connection with particular shipments, are not payments made for lighterage service alone or in re-

19 respect of any particular shipment, and are not dependent upon the ownership or the shipper of any particular shipment, but are made as a means and measure of compensation for all the general service performed on behalf of your petitioners by said Jay Street Terminal as a whole.

17. That the commission erred in its report and order in assuming that your petitioners' offer to receive shipments of the Federal Sugar Refining Company within lighterage limits and to lighter the same at their own expense to their terminals on the western shore of New York Harbor was limited to an offer to receive the same at the Jay Street Terminal. Your petitioners, as above recited, are now and have been ready and willing to receive shipments of the Federal Sugar Refining Company at any point within lighterage limits, whether at a public station or private dock, in accordance with their tariffs on file with the Interstate Commerce Commission.

18. That the commission erred in its report and order in requiring an allowance to be made to the Federal Sugar Refining Company measured by the amount paid to the Jay Street Terminal for the transportation service performed by it in connection with the sugar of Arbuckle Brothers. Such payments to the Federal Sugar Refining Company, if made at all, must be made for the performance by it of a part of the transportation service from Pier 24 to the terminals of your petitioners on the western shore of New York Harbor,

and must be a just and reasonable compensation for such service and not measured by the payment made to the Jay Street Terminal.

That payment to the Federal Sugar Refining Company for lighterage service from Pier 24, North River, to any terminal of your

20 petitioners on the western shore of New York Harbor of the same amount which may reasonably be paid and is paid to

the Jay Street Terminal for the performance of the transportation service furnished by it in connection with the sugar of Arbuckle Brothers, would be an unjust and unreasonable allowance to the Federal Sugar Refining Company, and therefore in violation of the law, inasmuch as the lighterage from Pier 24, North River, to the western shore of New York Harbor costs the Federal Sugar Refining Company nothing, being included without extra charge in the service required by it from Yonkers to the lighterage limits by reason of the fact of the location of its plant at Yonkers.

If, on the other hand, your petitioners should comply with said order of the commission by not paying any allowance as aforesaid to said Federal Sugar Refining Company and refraining from paying any compensation to the Jay Street Terminal, then your petitioners would be deprived of their property without due process of law, as they would be unable to continue their present lawful contractual relations with said Jay Street Terminal whereby they are afforded a freight station for the general shipping public in the Borough of Brooklyn, accessible to said Jay Street Terminal, and would be unable to continue their present lawful practice of permitting the lighterage of Arbuckle Brothers' sugar from the Jay Street Terminal to your petitioners' terminals on the west shore of New York Harbor, to be performed by the Jay Street Terminal and of paying the Jay Street Terminal a just and reasonable compensation therefor.

19. That the commission erred in its report and order in finding that your petitioners unduly discriminated against the Federal

Sugar Refining Company and unduly preferred Arbuckle 21 Brothers in violation of the act to regulate commerce, because:

(a) The circumstances and conditions attending the shipment and transportation of Arbuckle Brothers' sugar from the Jay Street Terminal are substantially dissimilar from the circumstances and conditions attending the shipments of the Federal Sugar Refining Company as shown by the facts hereinbefore set forth.

(b) No preference or advantage accrues to Arbuckle Brothers or prejudice or disadvantage is sustained by the Federal Sugar Refining Company by reason of the lighterage of the sugar of Arbuckle Brothers by the Jay Street Terminal and the payment by your petitioners to said Jay Street Terminal of a just and reasonable amount therefor, and the refusal of your petitioners to make an allowance to the Federal Sugar Refining Company for the lighterage of its sugar to the terminals of your petitioners on the west shore of New York Harbor. The payment to the Jay Street Terminal being no more than just and reasonable compensation for the service performed is only equivalent to the performance of that service by your petition-

ers, which your petitioners would be required to and would perform with their own equipment if the lighterage of such sugar by the Jay Street Terminal and the payment therefor were discontinued. Your petitioners now, and during all the time referred to in this petition hold themselves out and have held themselves out as willing to perform the same service from any point within the lighterage limits for the Federal Sugar Refining Company in accordance with their tariffs on file with the Interstate Commerce Commission.

Whatever prejudice or disadvantage the Federal Sugar
22 Refining Company may be under arises out of the location of
its refineries at Yonkers, beyond the lighterage limits of your
petitioners and the necessity it is therefore under of paying for its
lighterage.

20. That the commission erred in its report and order in requiring an allowance to the Federal Sugar Refining Company, in that such order requires in effect the extension of your petitioners' lighterage limits to include the city of Yonkers. That your petitioners have established lighterage limits as above described within which they perform transportation service as common carriers and they may not lawfully be required to extend the limits within which they perform such service as an alternative to the discontinuance of lawful contractual relations for the maintenance and operation of terminal station facilities and the performance of transportation service within such limits.

21. That if your petitioners are required to obey said order of the commission pending final determination of this action, they will suffer and sustain irreparable damage in that they will be required either to pay money to the Federal Sugar Refining Company for the lighterage of its sugar from Yonkers to your petitioners' terminals on the west shore of New York Harbor, which money in the event of a final decree herein in their favor, they will be unable to recover, or to discontinue payments to the Jay Street Terminal to compensate for the lighterage of the sugar shipments of Arbuckle Brothers, thereby violating the aforesaid contracts with the Jay Street Terminal, and thus subjecting themselves to actions for damages for such violation, and also to the termination of the contracts

23 and loss of the terminal and transportation facilities cov-
ered thereby, making it necessary to furnish other facilities
to handle the traffic. Moreover, that the discontinuance of
the Jay Street Terminal as a public station which may follow the
discontinuance of payments to the Jay Street Terminal for services
performed with respect to the sugar of Arbuckle Brothers, would
result in great inconvenience and expense to a large number of ship-
pers and receivers of freight who have no access to private wharves
or piers and would be required to truck shipments to and from dis-
tant public stations.

Wherefore, your petitioners pray that a final decree may be entered herein setting aside and annulling said order of the Interstate Commerce Commission, dated the 5th day of December, 1910.

and further that a temporary injunction may issue herein suspending said order and any and all proceedings thereunder pending a final determination of this proceeding.

And your petitioners will ever pray.

Dated, New York, April 11th, 1911.

HUGH L. BOND,
JACKSON E. REYNOLDS,
W. S. JENNEY,
GEORGE F. BROWNELL,
J. F. SCHAPERKOTTER,
JOHN B. KERR,
GEORGE STUART PATTERSON,

Solicitors for Petitioners.

STATE OF NEW YORK,

County of New York, ss:

I, George F. Randolph, having been first duly sworn according to law, do depose and say that I am an officer, to wit, first vice president of the Baltimore and Ohio Railroad Company, and that
24 I have read the foregoing petition, that I know the contents thereof, and that the statements therein contained are true according to the best of my knowledge and belief.

GEO. F. RANDOLPH.

Sworn to and subscribed before me this 12th day of April, 1911.

[SEAL.]

C. L. MALCOLM,

Notary Public.

Notary public, Kings Co. #202. Register's office, Kings Co. #4495. Certificate filed in N. Y. Co. #3208.

STATE OF NEW YORK,

County of New York, ss:

I, George D. Dixon, having been first duly sworn, do depose and say that I am an officer, to wit, freight traffic manager of the Pennsylvania Railroad Company, that I have read the foregoing petition, that I know the contents thereof, and that the statements therein contained are true according to the best of my knowledge and belief.

GEO. D. DIXON.

Sworn to and subscribed before me this 12th day of April, 1911.

[SEAL.]

C. L. MALCOLM,

Notary Public.

Notary public, Kings Co. #202. Register's office, Kings Co. #4495. Certificate filed in N. Y. Co. #3208.

STATE OF NEW YORK,

County of New York, ss:

E. M. Snyder, assistant freight traffic manager of the Central Railroad Company of New Jersey; B. D. Caldwell, vice president of the Delaware, Lackawanna & Western Railroad Company; D. W. Cooke,

25 general traffic manager of the Erie Railroad Company; T. N. Jarvis, vice president of the Lehigh Valley Railroad Company, and J. C. Anderson, traffic manager of the New York, Ontario & Western Railway Company, being duly sworn, each for himself deposes and says that he is an officer of one of the petitioners herein, as above stated, that he has read the foregoing petition, that he knows the contents thereof, and that the statements therein contained are true according to the best of his knowledge and belief.

E. M. SNYDER.
B. D. CALDWELL.
D. W. COOKE.
T. N. JARVIS.
J. C. ANDERSON.

Sworn to and subscribed before me this 12th day of April, 1911.

C. L. MALCOLM. {SEAL.
Notary Public.

Notary public, Kings Co. #202. Register's office, Kings Co. #4495. Certificate filed in N. Y. Co. #3208.

26

EXHIBIT "A."

This agreement, made the fifth day of February, A. D. one thousand nine hundred and six, by and between Jay Street Terminal (hereinafter called Terminal Company), party of the first part, and Erie Railroad Company, party of the second part, witnesseth:

Whereas the Terminal Company is the owner of premises in the Borough of Brooklyn, city of New York, lying along and contiguous to the East River at a point east of Catherine Ferry, so-called, and west of the United States navy yard, upon which there are now erected or in process of erection, certain warehouses, bulkheads, docks and piers, railway tracks and sidings equipped or about to be equipped with suitable float bridges and approaches and the usual appurtenances for receiving, handling, and delivering freights and for transporting same between said premises and the freight station of said Railroad Company located at Jersey City, N. J.; and

Whereas the said Terminal Company is engaged in and will continue in the business of receiving freights at its said premises and carrying the same in both directions between its said premises and the said station of said Railroad Company and other carriers; and

Whereas the said Railroad Company desires to avail itself of the facilities, conveniences, and services of the said Terminal Company in the transportation of freights in both directions between the said premises of said Terminal Company and the aforesaid freight station of the said Railroad Company;

27 Now, therefore, in consideration of the mutual covenants, promises, and agreements herein contained the said parties do hereby covenant, premise, and agree to and with each other as follows:

First. The said Terminal Company will put and maintain its premises in good order and condition for the reception and delivery

of such freights, and will provide tugboats, car floats, docks, piers, float bridges, and approaches adequate at all times to receive, discharge, transfer, and deliver such freights loaded or to be loaded in cars under this contract, and sufficient to accommodate the amount of business hereunder contemplated.

Second. Said Terminal Company will receive at the said float bridges of said Railroad Company at its aforesaid freight station, in cars to be placed upon its floats by said Railroad Company, all freights intended for delivery at the aforesaid premises of the said Terminal Company, and will safely carry the same to its said premises, and there make delivery thereof to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of said Railroad Company and carry and deliver the same to said Railroad Company upon said Terminal Company's floats at the float bridges of said Railroad Company at its aforesaid freight station.

Third. The responsibility of said Terminal Company for eastwardly bound cars and the freights therein shall begin when the cars are placed upon its floats at the said float bridges at the aforesaid station of said Railroad Company, and shall continue as respects the cars until they have been returned by it, loaded or empty;

and as respects the freights contained in eastwardly bound 28 cars, its responsibility shall continue until the actual delivery thereof to and acceptance by the consignees at Brooklyn. As respects the freights to be transported westbound, said Terminal Company's responsibility shall commence at the time the same is received from the consignor at its aforesaid premises, and shall continue until said freights, loaded into cars, have been brought to the float bridge of said Railroad Company at its aforesaid freight station and until the floats have been attached to the float bridge and the cars are in complete readiness for removal from the car floats by said Railroad Company.

Fourth. The Terminal Company agrees to provide and keep at its own expense upon its aforesaid premises a competent person to superintend the business hereunder contemplated and to carry out the rules of said Railroad Company as to loading cars.

Fifth. The Railroad Company agrees to construct and maintain all necessary tracks, float bridges, approaches, and appurtenances at its said freight station to adequately carry out the purpose of this agreement.

Sixth. Said Railroad Company will pay said Terminal Company in full for all its services under this contract as well as in full compensation for all responsibility to be undertaken by it in respect to cars and freight, as follows:

(a) For all freights transported over said Railroad Company's railroad which shall have been received from its connecting lines west of Trunk Line western termini, on through rates, or for freight received by the said Terminal Company at its aforesaid premises and destined for transportation by said Railroad Company

29 to points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth (4½) cents per hundred pounds. It is agreed, however, that whenever the allowance to Palmers Dock on eastbound or westbound rail-and-lake traffic or both is reduced from four and one-fifth (4½) cents to three (3) cents per hundred pounds, the same reduction shall be made in the allowance to Jay Street Terminal on rail-and-lake traffic. And it is also agreed that whenever the allowance for like service on such traffic to said Palmers Dock or any other Brooklyn terminal is increased above the rates herein specified, the same increase shall be made in the allowance to said Jay Street Terminal on such traffic.

(b) For freight originating at or destined to any of the said western termini or points east thereof, or billed to or from said western termini at local rates, the allowance to said Terminal Company shall be three (3) cents per hundred pounds, whether or not the traffic reaches the terminal point through any other of said termini; it being understood that the western terminal points referred to are as follows: Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Salamanca, Erie, Pittsburg, Allegheny, Bellaire, Wheeling, Parkersburg, Dunkirk.

(c) For "not to be graded" grain in bulk, for track delivery in the Borough of Brooklyn, the rate shall be three cents per hundred pounds.

29 (d) For freight which is rated per gross ton, either in official classification or in commodity tariffs, the allowance shall be three cents or four and one-fifth cents per hundred pounds, regardless of the gross ton rating.

Seventh. Said Terminal Company shall not be required to receive or carry any freights which may from time to time be classed as prohibited freights in the joint published tariffs of itself and the Railroad Company.

Eighth. It is understood that no grain shall be delivered by the said Railroad Company subject to this agreement except "not to be graded" grain billed for track delivery in Brooklyn; and that all such grain shall be delivered by said Terminal Company to the consignees from cars direct to wagons. No grain received by said Terminal Company from said Railroad Company shall be delivered in any other way, and no such grain shall under any circumstances, or at any times, be received or delivered into warehouses or elevators.

Ninth. All coal and coke shall be handled by special agreement.

Tenth. Said charges shall be made for each month and paid on or before the twenty-fifth day of the subsequent month.

Eleventh. Said Railroad Company agrees that during the continuance of this agreement the same rates of freight shall prevail from and to the premises of said Terminal Company that prevail from and to the regular freight stations of said Railroad Company in the Borough of Manhattan, city of New York, except when coming from or going to points east of Susquehanna, in which case floatage shall

be added in both directions, to which the Railroad Company shall be entitled.

31 Twelfth. Said Terminal Company will be responsible for and pay to said Railroad Company all freight moneys and charges as set forth in freight bills rendered by said Railroad Company for the transportation of eastbound freights delivered to it, and in like manner shall be responsible for and pay to said Railroad Company all moneys and charges which have been made payable in advance on westbound freights, all of which payments shall be turned over to said Railroad Company in accordance with the latter's customary rules; and, if so required, the customary guaranteed bond shall be furnished by the said Terminal Company.

Thirteenth. Said Railroad Company will provide sufficient cars at all times for receiving and taking away the freights hereunder contemplated (unavoidable delay excepted), and to supply all the railway books and blanks necessary for the purpose of the business to be carried on under this contract, and with all reasonable despatch to receive and take away from the said float bridges at its aforesaid station all the westbound freights intended for transportation over its own lines and its connections.

Fourteenth. Said Terminal Company will insure and keep insured against loss by fire and marine risks, all freights, cars and property received by it upon its floats or its said premises under this contract so long as said freights, cars, or property shall remain in its possession, and until delivered to the consignees or to said Railroad Company as hereinbefore provided, including the time such freights, cars, or property shall be upon its lighterage line; and such insurance shall be for the benefit of said Railroad Company and others as their respective interests shall appear, and to an amount and in such manner as shall be satisfactory to said Railroad Company.

32 Fifteenth. Said Railroad Company will not, during the continuance of this agreement, unless legally compelled to do so, establish or maintain any freight stations within the limits of said Borough of Brooklyn between said Catherine Ferry and said United States navy yard. In case of any breach of this condition said Terminal Company may recover from said Railroad Company, and the latter shall pay to said Terminal Company, damages at the rate of three dollars for each and every carload, averaged at twenty thousand pounds, received or delivered or transported contrary to this provision.

Sixteenth. In case any eastbound freight consigned to stations of said Railroad Company in said city of New York other than the premises of said Terminal Company shall have its destination changed to the premises of the said Terminal Company and be delivered therat, said Terminal Company, will, at the request of said Railroad Company, collect from the consignee or forwarder the sum of three (3) cents per hundred pounds, and such three cents per hundred pounds shall be retained by said Terminal Company as full compensation for all services performed by it in such cases, and no other allowance shall be made under this contract in such case.

Seventeenth. Said Terminal Company will furnish said Railroad Company with a complete and accurate copy of each and all contracts made by it with other railroad companies during the term of this contract, and the Erie Railroad Company shall have and enjoy during the life of this contract all rights and privileges granted to any other railroad by said Terminal Company upon as favorable terms, with respect to allowances or otherwise, as granted to any other railroad company, anything herein to the contrary notwithstanding.

Eighteenth. This contract shall become operative and go into effect on the fifteenth day of February, 1906, and shall continue in force until March thirty-first, 1910, thereafter subject to termination upon ninety days' notice by either party.

Nineteenth. In case either party shall wilfully fail to keep or perform any of the terms or provisions herein contained on the part of such party to be kept or performed, then the other party hereto shall have the right to terminate this contract by giving thirty days' notice in writing of such termination to the offending party.

Twentieth. This contract shall be binding upon, for the benefit of and available to the parties themselves and their successors or assigns, as fully and to the same extent as if such successors and assigns had been mentioned in each of the covenants and agreements herein set forth.

In witness whereof the parties hereto have executed this contract in duplicate the day and year first above written.

JAY ST. TERMINAL,

By Wm. A. R. SMITH (a partner).

ERIE RAILROAD COMPANY,

By E. D. UNDERWOOD.

Attest:

[SEAL] DAVID BOSMAN, *Secretary.*

Witness as to Jay St. Terminal.

Before the Interstate Commerce Commission.

(Refer to Docket No. 1082 in your answer.)

FEDERAL SUGAR REFINING COMPANY OF YONKERS

vs.

BALTIMORE & OHIO RAILROAD COMPANY; CENTRAL RAILROAD
Company of New Jersey; Delaware, Lackawanna & West-
ern Railroad Company; Erie Railroad Company; Lehigh
Valley Railroad Company; New York, Ontario & Western
Railway Company; and Pennsylvania Railroad Company.

The petition of the above-named complainant respectfully shows:

I. That complainant is a corporation organized and existing under the laws of the State of New York, having its principal place of

business in the city of Yonkers, in the State of New York, and is engaged in refining sugar and in shipping the same between points in different States of the United States.

II. That defendants are common carriers engaged in the transportation of property by railroad between points in different States in the United States, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4,

1887, and acts amendatory thereof or supplementary thereto.

35 III. That complainant owns and operates a sugar refinery located in said city of Yonkers, about 1 mile north of the city of New York, the capacity of said refinery being about 5,000 barrels of sugar per day, approximately 15 per cent. of which destined to other States is lightered down the Hudson River to the various terminals of defendants on the New Jersey shore of the Hudson River except the Baltimore & Ohio Railroad Company whose terminal is at St. George, Staten Island, and all of which are in the port limits of the port of New York. That the American Sugar Refining Company, through the Brooklyn Eastern District Terminal Company, and the Arbuckle Brothers' Refinery, through the Jay Street Terminal Company, both of said refineries being located in Brooklyn, New York, also float or lighter a considerable portion of their sugar to said terminals of defendants. That on shipments from Brooklyn aforesaid by complainant's said competitors which are received by defendants at their said terminals an allowance or arbitrary of 4½ cents per 100 pounds is made by said defendants to said Brooklyn refineries, in the manner aforesaid, when the shipments are destined to points west of the western termini of the trunk lines including Buffalo and Pittsburg, and 3 cents per 100 pounds when shipments are destined to points east of said western termini of the trunk lines. That defendants refuse to make any allowance whatsoever on shipments of sugar delivered by complainant's via the Ben Franklin Transportation Company's lighters to defendants' said terminals. That defendants have arbitrarily fixed a boundary beyond which they will not grant said allowances on shipments received at their terminals by floats or lighters. That said lighterage limits as prescribed

36 by defendants are: On North River, Battery to 135th Street; Jersey side, National Storage Docks, Communipaw to Fort Lee; on East River, New York side, Battery to Jerome Avenue Bridge; Brooklyn side, Pot Cove Astoria, to 69th Street, South Brooklyn. That because complainant's refinery at Yonkers is located outside of said prescribed lighterage limits defendants decline to make complainant the same lighterage allowances which they grant to said Brooklyn refineries, in the manner aforesaid, on shipments delivered at their said terminals. That complainant's refinery is within the port of New York, under and by virtue of an act of Congress approved May 7, 1891, which includes Yonkers within the port of New York, and entitles complainant's refinery located in Yonkers to the same port privileges as are extended to refineries in Brooklyn. That complainant performs identically the same service through the

Ben Franklin Transportation Company in the lighterage or floatage of its shipments, so far as the defendants are concerned, as is performed by said Brooklyn refineries, in the manner aforesaid. That complainant's shipments via said terminals when delivered thereat are deliveries to defendants within the lighterage district just as much as the shipments of said Brooklyn refineries are deliveries at said terminals and there is no reason why complainant should be deprived of said allowances by refusal to grant the same based upon a boundary line prescribed by defendants as establishing free lighterage limits within which defendants themselves render or provide the lighterage service. That said unreasonable restriction results in a great hardship to complainant, undue discrimination in favor of its said competitors in business and should be abolished, substituting therefor a regulation placing complainant upon an equality with its said competitors as to allowances for lighterage to said terminals. That by reason of such practice defendants charged and collected from complainant between the first day of August, 1902, and the thirtieth day of April, 1907, an excess charge on its shipments of sugar \$13,663.76, for which reparation is claimed.

IV. That by reason of the premises defendants have been and are charging complainant unjust and unreasonable rates of transportation over their lines, because of the unjust regulation above set forth, and have been and are subjecting complainant, its said traffic in sugar, and the city of Yonkers, to unjust discrimination and to undue and unreasonable prejudice and disadvantage, and are giving to complainant's said competitors in business at Brooklyn undue preference and advantage, and are not allowing complainant a just and reasonable charge for its service rendered in aid of the transportation of sugar, all of which is in violation of the act to regulate commerce, as amended, and more particularly sections one, two, three, and fifteen thereof.

Wherefore, complainant prays that defendants be required to promptly answer the charges herein, that after due hearing and investigation an order be made commanding said defendants to wholly cease and desist from the aforesaid violations of the act to regulate commerce, as amended, and to the full extent thereof; and to pay to complainant by way of reparation said sum of \$13,663.76, or such other sum as the commission may upon the proof to be adduced herein find complainant entitled to recover; that the commission determine what is a reasonable allowance as to maximum that defendants shall pay to complainant for the service of lighterage said shipments of sugar to said terminals; that an order be entered requiring 38 said defendants either to withdraw such allowances or free service granted to said Brooklyn refineries, in the manner aforesaid, whereby complainant is compelled to pay unreasonable rates and is unjustly discriminated against, or to make similar allowances to complainant on its shipments delivered at said terminals; that the commission also prescribe such rules and regulations in lieu of those now existing over defendants' lines as will in the future

operate to prevent the continuance of the aforesaid exactions, unjust discrimination, or undue and unreasonable prejudice and disadvantage to complainant and its traffic in sugar, by reason of the unjust regulation or arrangement above set forth, and that such other and further order or orders may be entered as the commission may deem necessary in the premises and complainant's cause may appear to require.

Dated at Yonkers, N. Y., May 20th, 1907.

FEDERAL SUGAR REFINING COMPANY OF YONKERS,
By EDWIN A. SMITH, *Treasurer.*

EXHIBIT "C."

Before the Interstate Commerce Commission.

THE FEDERAL SUGAR REFINING COMPANY OF
Yonkers
v.
BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Docket No. 1082.

39 The separate answer of the Lehigh Valley Railroad Company, one of the defendants in this proceeding.

The above-named defendant, The Lehigh Valley Railroad Company, for answer to the complaint in this proceeding, respectfully states:

1. This defendant has not knowledge sufficient for the formation of a belief as to the organization of the complainant, or the other matters set forth in the first paragraph of the complaint, and prays that the averments of the said first paragraph so far as material may be proven.

2. This defendant admits that it is a common carrier by railroad engaged in transportation by railroad, in part interstate, in connection with the railroads of other carriers between various points in the United States, and that so far as relates to its interstate carriage of property, it is subject to the provisions of the act of Congress entitled "An act to regulate commerce" approved February 4, 1887, and of acts amendatory thereof and supplementary thereto, so far as the same may be in conformity to the provisions of the Constitution of the United States.

3. This defendant admits that complainant operates a sugar refinery located in the city of Yonkers, New York, but has not information sufficient for the formation of a belief as to the capacity of said refinery, nor as to the portion of its output which is lightered down the Hudson River. This defendant denies that the American Sugar Refining Company and Arbuckle Brothers Refinery lightered or floated in cars sugar to terminals of the defendants. It is informed and believes that sugar is lightered or floated in cars by the Brooklyn Eastern District Terminal Company, and the Jay Street

40 Terminal Company, which terminal companies are agents for

some or all of the defendants herein. It denies that an allowance of 4½ cents per 100 pounds is made by this defendant to said American Sugar Refining Company and Arbuckle Brothers Refinery when the shipments are destined to points west of Buffalo and Pittsburg, and of 3 cents per 100 pounds when destined to points east of Buffalo and Pittsburg. Such allowance is made to the terminal companies aforesaid, which are agents of this defendant, and the allowance aforesaid is paid to them not only as compensation for the particular service in question but also in compensation for other services which are performed by the terminal companies. The said terminal companies perform various services under contract with this defendant, and furnish to it a bond for the faithful performance of such services. This defendant admits that it makes no allowance on shipments of sugar delivered by complainants via the lighters of the Ben Franklin Transportation Company, for the reason that that lighterage company is not an agent of this defendant and does not handle its traffic generally; and also because the traffic originates outside of the lighterage limits of New York Harbor; and this defendant makes no such allowances on any such traffic to any transportation or lighterage company on westbound traffic except from within said lighterage limits to its agents as aforesaid. This defendant admits that the lighterage limits of the port of New York, are as stated in the complaint; these limits constitute a boundary beyond which allowances are not granted for lighterage. This defendant denies, however, that such fixing of a boundary is arbitrary; it is necessary to the proper and orderly management of its business that there should be fixed lines drawn as to lighterage limits; it submits that the legislation as to the port of New York

referred to in the complaint has no connection with the question of lighterage limits. This defendant has not information sufficient for the formation of a belief as to the amount of so-called excess charges that the complainant paid on its shipments of sugar during the five years between 1902 and 1907.

4. This defendant denies that it has been and is charging complainant unjust and unreasonable rates of transportation, and that it is subjecting the complainant and the city of Yonkers to unjust discrimination and undue and unreasonable prejudice and disadvantage, and denies that it is giving the complainant's competitors in business at Brooklyn undue preference and advantage, and denies that it is not allowing complainant a just and reasonable charge in aid of the transportation of sugar. It denies that its action in the premises is in violation of the act to regulate commerce, or of any section thereof.

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

LEHIGH VALLEY RAILROAD COMPANY,
By C. A. BLOOD,
Freight Traffic Manager.

F. H. JANVIER, Counsel.

Before the Interstate Commerce Commission,

FEDERAL SUGAR REFINING COMPANY OF YONKERS

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 1082.

Decided June 24, 1909.

Report and order of the commission.

FEDERAL SUGAR REFINING COMPANY OF YONKERS

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 1082.

Submitted June 23, 1908. Decided June 24, 1909.

Defendants have prescribed limits in and about New York Harbor within which they will, for the flat New York rate, perform the service of transporting traffic between their rail terminals on the Jersey side of the Hudson and points in the harbor. At Yonkers, N. Y., some distance north of the free-lighterage limits, complainant operates a sugar refinery, and to make shipments there-

from over defendants' lines it must lighter the sugar from its 43 refinery to points within the lighterage limits or forward it via the New York Central to Sixtieth Street, New York. By the latter route it can obtain the New York rate, but the route is said to be unsatisfactory by reason of delays in the New York Central's city terminals. One of the defendants' leased terminals in Brooklyn is owned and operated by the same partnership which operates a sugar refinery in competition with complainant, the sugar from this refinery passing through the terminal and the partnership receiving from defendants for lighterage thereof the same amount allowed for lighterage of other freight by the same terminal company. It is claimed by complainant that upon shipments delivered by it to defendants' Jersey rail terminals it should receive the same allowance that is made to companies lighterage freight from points in New York Harbor or that the lighterage limits should be extended to include Yonkers. Held:

1. By their lighterage regulations defendants have, in the only available manner, extended their lines to New York, but such extension results from the exercise of business discretion, not from compliance with any requirement of the act to regulate commerce; and by such extension defendants incur no liability under the act to extend their lines to Yonkers or other near-by communities.

2. The identity of ownership between the Jay Street Terminal in Brooklyn and the adjoining refinery in Brooklyn is a relationship which should be subjected to the closest scrutiny. The 44 only inference which can be drawn from the present record

is that the Jay Street Terminal does not earn in excess of a reasonable return upon the investment. The 15th section of the act clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation, and nothing has been made to appear which indicates that the allowance in question exceeds the authorized measure of compensation. Complaint dismissed without prejudice.

Ernest A. Bigelow and Henry A. Wise for complainant.
 Hugh L. Bond, jr., for Baltimore & Ohio Railroad Company.
 Robert W. de Forest and Jackson E. Reynolds for Central Railroad Company of New Jersey.

William S. Jenney and Douglas Swift for Delaware, Lackawanna & Western Railroad Company.

George F. Brownell for Erie Railroad Company.
 J. F. Schaperketter and Frank H. Platt for Lehigh Valley Railroad Company.

John B. Kerr for New York, Ontario & Western Railway Company.

George Stuart Patterson for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION.

KNAPP, Chairman:

This complaint alleges in substance that defendants' regulations in respect to the lightering of freight in and about New York Harbor subject complainant to the payment of unreasonable transportation charges upon shipments of sugar from Yonkers, N. Y., to points upon defendants' lines and unduly discriminate in favor of sugar refineries within the lightering limits of New York Harbor. Reparation is asked.

Defendants are common carriers subject to the act to regulate commerce. Complainant is a corporation organized under the laws of New York, engaged at Yonkers, N. Y., in refining sugar. Its refinery is situated upon the east bank of the Hudson River and includes about 500 feet of water front, where it has docks, bulkheads, and other facilities for handling and shipping its product by vessel. Complainant began to refine sugar in 1902, and its maximum capacity is now about 5,000 barrels per day. Its actual daily output has apparently averaged between 3,000 and 4,000 barrels, or 30 to 40 carloads.

There are three principal routes by which complainant can ship its product from Yonkers. It has sidetrack connection with the New York Central Railroad and ships the greater part of its product to points conveniently accessible via that line and its connections. To southern and southwestern points it can ship via the coastwise steamship lines and their southern rail connections. When shipping over these water and rail routes complainant lighters its own shipments from Yonkers to the New York piers of the coastwise lines.

and is given for such service an allowance out of the through rate which varies according to the destination of the shipment, but appears on the whole to cover the expense of lighterage and in some instances to leave a profit to complainant. To points on defendants' lines which can not be conveniently reached by routing north over

the New York Central defendant can ship south over that
46 line. In such case shipments are carried by the New York

Central to Sixtieth Street, thence floated across New York Harbor and delivered to defendants at their depots on the west side of the river. The rates from Yonkers to points on defendants' lines via this route are in most instances the same as the rates from New York to the same destinations. But complainant alleges that the delay involved in handling shipments via this route is so great as to make its use commercially impracticable. It is said that, owing to the congestion of traffic in the yards of the New York Central in New York, ten days on the average are consumed in transporting a car from Yonkers to defendant's terminals. It is also asserted that the New York Central does not and can not furnish sufficient cars to care for complainant's shipments. For this reason, it is alleged, complainant hires the Ben Franklin Transportation Company to lighter from its refinery at Yonkers to defendants' freight depots on the Jersey shore shipments requiring transportation over their lines, and pays for this service 3 cents per 100 pounds. And this situation, in connection with defendants' lighterage regulations in respect of traffic passing across New York Harbor, gives rise to this complaint.

Defendants have established so-called lighterage limits in and about New York Harbor; that is to say, they have prescribed limits within which they will, at the flat New York rate, receive and deliver traffic at points in New York Harbor. The free lighterage limits are defined in the tariffs of all the defendants as follows:

"North River: New York side, Battery to One hundred and thirty-fifth Street. New Jersey side, National Storage docks, Communipaw, to and including Fort Lee, N. J.

47 "East River and Harlem River: New York side, Battery to Jerome Avenue Bridge, including Harlem River side of Wards and Randalls Islands. Brooklyn side, from Pot Cove, Astoria, to and including Newton and Dutch Kills Creeks, and points in Wallabout Canal west of Washington Avenue Bridge and to Hamilton Avenue Bridge, Gowanus Canal, and to and including Sixty-ninth Street, South Brooklyn (Bay Ridge).

"New York Bay: Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Sheepshead Island; points on the New Jersey shore of New York Bay and on the Kill van Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, Staten Island."

The practical effect of the lighterage service established by defendants is to extend their lines to New York and Brooklyn instead of stopping at the western side of the Hudson. In some instances the piers to and from which freight is lightered are the property of

individual lines; others are used as union terminals by all the defendants. In case of certain bulky articles requiring special equipment defendants do not perform the lighterage service themselves, but make an allowance to outside lighters which perform that service for them.

The Jay Street Terminal and the Brooklyn Eastern District Terminal, in Brooklyn, are in the nature of union terminals and are designated as regular terminals of defendants in all their lighterage tariffs except those of the Pennsylvania Railroad Company, which has its

48 own freight station adjoining the Brooklyn Eastern District Terminal and handles freight through that terminal only to

a limited extent. The two terminals mentioned are owned by independent concerns with which defendants have contracts, substantially alike, which in fact make them the terminals of defendants for all purposes of receiving and delivering general freight from and to large shipping districts in Brooklyn. Defendants pay these terminals for their service 4½ cents per 100 pounds on all shipments handled through the terminals originating at or destined to points west of defendants' western termini, and 3 cents per 100 pounds upon shipments originating at or destined to said western termini or points east thereof. The two terminal companies, under these contracts, lighter or float eastbound freight from defendants' rail terminals to their respective terminals in Brooklyn and deliver it to consignees. They receive westbound freight from shippers and lighter or float it to the west bank of the Hudson. They assume full responsibility for all eastbound freight upon receiving it from the railroads and for all westbound freight until delivered to the railroads, and agree to indemnify the roads for all money paid out by them for loss of or damage to such freight while in the possession of the terminal companies. The terminal companies have authority to issue bills of lading of the railroads for westbound freight and are responsible for all claims, injury, or damages arising from their improper issuance. They are responsible for and pay to the railroad all freight charges on eastbound freight handled through their terminals and all freight charges payable in advance on westbound freight. The situation to-day is practically the same as it was, and had been for years, when

complainant began operations at Yonkers.

49 The Brooklyn Eastern District Terminal extends from North Fifth Street to North Tenth Street, in Brooklyn, covering 8 or 10 squares. It is owned by the partnership of Havemeyer & Elder. About half a mile from this terminal is the refinery of the American Sugar Refining Company, whose shipments over defendants' lines are handled through that terminal. The American Sugar Refining Company is a corporation and has no interest in the terminal. Members of the partnership of Havemeyer & Elder own 136 shares of the common and 81 shares of the preferred stock of the sugar company, whose total capital stock exceeds \$20,000,000. Prior to 1890 Havemeyer & Elder owned the refinery adjoining the terminal which is now the property of the American Sugar Refining Company.

The Jay Street Terminal in Brooklyn is located at the foot of Bridge Street, has a water frontage of 1,200 feet, and is about 600 feet deep. It is owned by a partnership composed of William A. Jamison and John Arbuckle. The Arbuckle Brothers Sugar Refinery, adjoining the Jay Street Terminal, is also owned by the same partnership. The total investment in the terminal property was shown to amount to approximately \$1,200,000. It was testified that the net earnings from the operation of the terminal for 1907 was \$35,566.84, or about 3 per cent on the investment, without making any allowance for interest or depreciation, and there is nothing in the record to indicate that the fact is otherwise.

Complainant's refinery at Yonkers is about 10 miles north of the present lighterage limits on the New York side of the Hudson. From the refinery to the rail terminals of defendants the distances are as follows: To the D. L. & W. Terminal, about $13\frac{1}{2}$ miles; to the Erie Terminal, about $13\frac{3}{4}$ miles; to the Pennsylvania Terminal about 14 miles; to the Central Railroad of New Jersey Terminal, about 16 miles; and to the B. & O. Terminal at St. George, Staten Island, about 20 miles. It appears that these distances are but a trifle more than the distances from Jerome Avenue Bridge, one of the extreme points in the free lighterage district on the East River, to the same terminals; but the distances to these Jersey terminals, respectively, from the Jay Street and Brooklyn Eastern District Terminals are quite small in comparison with the distances from Yonkers.

It will thus be seen that upon shipments to points on defendants' lines lightered from Yonkers complainant is at a disadvantage of 3 cents per 100 pounds, the cost of such lighterage, in comparison with the sugar refineries within the New York lighterage limits. Complainant asserts that this disadvantage results from unlawful discrimination by defendants in refusing to send their lighters to Yonkers to collect its shipments, or to make complainant an allowance out of the rate equal to the cost of lighterage; and upon the validity of this contention the case must be determined.

It is apparent that if there is any such wrongdoing as complainant alleges it must be caused in one or both of two ways: (1) Either complainant, in common with the city of Yonkers, suffers injury because defendants' refusal to perform lighterage service between Yonkers and Jersey City is an unjust discrimination; or (2) complainant individually is injured because of unlawful advantages accruing to the American Sugar Refining Company and the Arbuckle Brothers Sugar Refinery by reason of the relations existing between those refineries and the defendants through their contracts with the Brooklyn Eastern District and Jay Street Terminals.

51 Upon all the facts disclosed in this proceeding we are constrained to hold that failure to furnish lighterage service to and from Yonkers, while according such service to and from Greater New York, does not constitute unlawful discrimination. In fact, it is doubtful whether it comes within the legal meaning of discrimina-

tion, unjust or otherwise, unless it follows that the extension by a carrier of its line to a certain community results in unjust discrimination against another community which its line does not reach. It is clear to us that the so-called terminals in New York and Brooklyn, whether owned, leased, or operated under contract, are in fact the terminals of the defendant roads. The defendants by their tariffs agree to receive and deliver freight at those terminals; are responsible to the shipper or consignee for damage to or loss of property up to the time it is delivered at and after it is accepted at those terminals; and by their tariffs and bills of lading agree to carry, not merely to their Jersey City terminals but across the river to the several terminals in New York and Brooklyn.

The necessity of lighterage grew out of the peculiar situation of New York. Defendants could not practically reach that city either by tunneling under or bridging over the river; but the amount of traffic in that community made it highly desirable that they should in some convenient form be able to receive and deliver freight in the city, and therefore they adopted the only available means to that end—the extension of their lines by ferries and lighters. But this extension of their lines to New York was not in compliance with any requirement of the act to regulate commerce. It was merely the exercise by the carriers of business discretion in a matter of physical operation concerning which the Federal Government has not assumed to exercise authority, if any exists. As was said
52 in *Shamberg v. D. L. & W. R. R. Co.*, 4 L. C. C. Rep., 630, 662, referring to the lighterage service of defendants in New York Harbor:

"The geographical and physical conditions of the port of New York are such that lighterage or transfer of cars by floats is indispensable. All roads are obliged to do it more or less, and it is done for all kinds of traffic and for shippers generally. It is simply a necessity of the situation, and doubtless an inconvenience and expense that all would be glad to avoid if possible."

It must not be inferred that the commission disclaims jurisdiction over defendants' lighterage service. On the contrary, that service must, in our opinion, be conducted in accordance with the requirements and prohibitions of the act. All we hold is that by establishing a lighterage service in New York Harbor defendants incurred no liability, under the act to regulate commerce, to extend that service to Yonkers or other near-by communities, for the obvious reason that defendants have made themselves carriers by their own lines to New York, but have not assumed, and can not be required by this commission to assume, any such obligation in respect of Yonkers.

The whole argument of complainant on this branch of the case rests upon the proposition that defendants' terminals are on the Jersey side of the Hudson and that the lighterage service by which they reach Greater New York is an accessorial service, so to speak, like cartage, for example, which they can not grant to the sugar refineries in Brooklyn and lawfully withhold from complainant. We are un-

able to agree with this contention. In our judgment the Brooklyn terminals in question, like others within the lighterage limits of

53 New York Harbor, are the railroad terminals of defendants in that city, none the less so because they are reached by ferries instead of bridges. For these are the places to and from which Brooklyn traffic is taken in the cars in which it is transported, the places where the traffic is received from and delivered to the public, where it is loaded into and unloaded from defendants' cars substantially the same as if those cars were not floated across a river. To and from these places, and serving the public in that capacity, the defendants are common carriers "wholly by railroad" within the meaning of that phrase in the first section of the act. They have not undertaken to provide railroad facilities at Yonkers, a distinct municipality, and their refusal to furnish or engage in transportation to and from that city on the same terms and conditions as apply at Brooklyn is not a violation of the regulating statute.

Even if this lighterage service be regarded as a species of cartage, it would not necessarily follow that it must be extended to Yonkers, because it is provided in Greater New York. That is to say, the peculiarities of New York's situation might justify defendants in affording to shippers in that city a facility of this kind which they would not be bound to furnish elsewhere. But any discussion of this point is unnecessary in view of the conclusion already stated. Holding, as we do, that failure to establish lighterage service to and from Yonkers is not unjust discrimination, we must deny the application for a corrective order predicated upon such alleged discrimination.

Defendants do join with the New York Central in through routes and joint rates from Yonkers to points on their lines, and in general Yonkers takes New York rates and therefore, so far as rates are concerned, is on a parity with New York. If these through 54 routes are unsatisfactory, the apparent remedy is an application to the commission to establish a satisfactory through route, provided there are carriers whose duty it is to join in forming such a route.

The relationship existing between the American Sugar Refining Company and the Brooklyn Eastern District Terminal, by means of stock ownership in the former by members of the firm who own the latter, is apparently so slight as to require no comment, and that question was virtually waived on the hearing. The relationship existing between the Jay Street Terminal and the Arbuckle Brothers Sugar Refinery presents one of those embarrassing situations which inevitably arises when a portion of the service which the carrier is required or undertakes to perform is farmed out to a party who supplies a large percentage of the traffic in respect of which such service is rendered. Such an arrangement naturally excites suspicion and should be subjected to the closest scrutiny. In the present case, as above stated, the partnership of Jamieson & Arbuckle own both the Jay Street Terminal and the Arbuckle Brothers Sugar Refinery; and approximately one-third of the traffic passing through

that terminal is shipped from or consigned to the sugar refinery. It appears that it is difficult, if not impossible, for defendants to obtain in this section of Brooklyn water front upon which to erect a terminal of their own. Moreover, the commission has already held that railroads may secure and maintain freight depots by contract with independent concerns, and that such depots thereby become legally and to all intents and purposes the freight depots of the railroads. (Cattle Raisers' Asso. v. C., B. & Q. R. R. Co., 11 I. C. C. Rep., 277; R. R. Com. of Ky. v. L. & N. R. R. Co., 10 I. C. C. Rep., 173; Central Stock Yards Co. v. L. & N. R. R. Co., 192 U. S., 55 568.) If, then, the defendants may lawfully contract for the use of the Jay Street Terminal, the only question remaining is whether the amount paid to this terminal operates in effect as a rebate upon the Arbuckle sugar shipments. The principle involved has been stated in *In the Matter of Allowances*, 12 I. C. C. Rep., 85, as follows:

"It is true that under the terms of section 15 of the amended act to regulate commerce a shipper may receive, in the rates charged, a 'just and reasonable' allowance from a carrier for any service or instrumentality furnished by him in connection with the transportation of his own property. This provision, however, must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. And therefore if the allowance involves a profit over and above the actual cost of the service rendered it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. It is not a rebate when it does not exceed the actual cost. But to avoid that fundamental objection the actual cost of the service rendered must be the limit of the allowance."

Upon the present record it is not shown that any profit accrues to the Jay Street Terminal under the payments now made, as stated above, of 3 and 4½ cents per 100 pounds. Indeed, the only inference which can be drawn from the proof submitted is that the Jay Street Terminal does not receive a reasonable return upon the investment. If this be the truth of the matter, as must be assumed on the evidence now before us, we are unable to perceive that the existing relationship between the defendants and this terminal company is

56 illegal or results in any violation of the act. The fifteenth section as amended clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation. This provision, for aught we can see, applies to the Arbuckle concern, and nothing has been made to appear which indicates that the allowance to that concern exceeds the authorized measure of compensation.

Moreover, it is evident that the disadvantage of complainant does not arise from the fact that Arbuckle Brothers own and operate the Jay Street Terminal, but rather and simply from the fact that they are within while complainant is outside of the free lighterage district. If Arbuckle Brothers should transfer that terminal to the defendants, or to an outside party, and cease to have any interest in it whatever, complainant would derive no appreciable benefit. As against complainant Arbuckle Brothers would have the same advantage as at present, under their contract with defendants, if they were to sell their Brooklyn plant to an independent refiner and establish their own business of refining sugar in Jersey City or Philadelphia. The contract in question is of no practical consequence to complainant and its situation would not be improved in any substantial or noticeable degree if that contract were canceled and the Jay Street Terminal operated by defendants. So far as concerns complainant there is no practical difference in the relations of defendants with Arbuckle brothers as shippers of sugar and the American Sugar Refining Company as a shipper of the same commodity, although in one case the common ownership of refinery and terminal is complete while in

the other case such common ownership is a negligible quantity.

57 This, of course, is upon the assumption that we are correctly informed by the evidence as to the financial results of the operation of the Jay Street Terminal under the Arbuckle contract. If the facts are otherwise, as complainant has had full opportunity to ascertain and as might be found upon more complete and accurate disclosure, we would presumably be led to a different conclusion.

Upon the showing now made we are constrained to hold that such discrimination as at present exists in favor of the Arbuckle Refinery by reason of the relationship in question is not undue or unlawful. This determination, however, will not preclude the further investigation of this phase of the controversy, either at the instance of this complainant or in an independent proceeding. It follows that the complaint should be dismissed without prejudice, and it will be so ordered.

CLARK, Commissioner, concurring:

I agree fully with the views of the majority on the question of extending defendant's lighterage limits so as to include Yonkers. I agree also with the conclusion of the majority report to the effect that defendants should not be required to pay complainant for lighterage its sugar to defendants' terminals in the lighterage limits. I base that view, however, upon the fact that complainant's factory is outside the lighterage limits and that, therefore, no obligation rests upon the defendants to either go and get complainant's shipments or hire another to perform that service. In my opinion, if the complainant were located within the lighterage limits the defendants could not lawfully permit complainant's competitors to lighter their sugar and receive pay for that service and refuse to permit com-

plainant to lighter its sugar and receive the same compensation for that service.

58 It is not enough to say that because the Jay Street Terminal, as a whole, yields small dividends, Arbuckle as the owner of the Jay Street Terminal receives no profit from the lightering of Arbuckle's sugar. The whole plant might be run at a loss, and still there might be an abnormal profit in the lightering of sugar. It is all a question of fact and of bookkeeping.

I think, therefore, unjust discrimination would necessarily exist if defendants permitted one sugar shipper within the lighterage limits to lighter his sugar and receive pay for that service and refused the same privilege and compensation to another sugar shipper also located within the lighterage limits. It might be that one such shipper would make a profit out of such allowance and that another shipper would not, just as one may make more profit than the other from the manufacture of the sugar. That, however, is a question of business ability, management, or advantage which neither the carriers nor this commission has any right to undertake to adjust or equalize.

LANE, Commissioner, dissenting:

I can not agree with the order of dismissal which the majority directs to be entered in this case. The principle involved is so important, and I am so certain that such arrangements as the one here under examination are discriminatory and bound finally to be forbidden if fully discussed, that I venture to set out at some length certain grounds of dissent.

The railroads ending at the Jersey shore are under necessity to provide themselves with terminal facilities in New York City and Brooklyn. Not only is it to their advantage to do so but it is to

the public interest also. The shippers of New York City and

59 Brooklyn would in many cases be compelled to remove their

places of business to other points if the transportation facilities afforded them by the lighterage extensions of the rail lines were withdrawn. Apparent as it is, however, that lighterage facilities as extensions of the New Jersey rail ends to Brooklyn are necessary and commercially inevitable, it can not be forgotten that the chief purpose of the act to regulate commerce is the prevention of discrimination and that no arrangements whatever to secure such extensions can be lawfully allowed to work discrimination between shippers.

In this particular matter of the transportation of sugar from Brooklyn to the West, the fact appears that the railway carriers have chosen, as the concerns to furnish the lighterage facilities from Brooklyn to the Jersey shore, concerns which are either directly engaged in the refining and shipping of sugar or which are so closely identified with the business of refining and shipping sugar that the routing of an immense tonnage is subject to their disposition. Hav-

ing so chosen such persons to furnish lighterage facilities the rail-ways should be required to do whatever may be necessary to remove any resulting discrimination against other shippers of sugar.

By the arrangements here under consideration the firm of Arbuckle Brothers, a shipper of sugar from Brooklyn, upon delivery of freight from its boats to the rail ends on the Jersey short receives an allowance of 60 cents per ton upon shipments to Pittsburg or east thereof, and an allowance of 85 cents per ton on shipments to points west of Pittsburg.

The American Sugar Refinery has a more complex form of organization, its power as a shipper being used to further the fortunes of an independent corporation owning the floats and lighters 60 on which its sugar reaches the Jersey shore. The commission does not know what the ownership relation is between the American Sugar Refinery and the Brooklyn Eastern District Terminal, the lighterage concern patronized by it. It does know that the refinery has in the past and does now use its power as a shipper to add to the earnings of the terminal company.

The first lighterage contract involving the use of the property now known as the Brooklyn Eastern District Terminal was made on September 1, 1881. The parties to the contract were Lowell M. Palmer, personal representative of H. O. Havemeyer, and the New York, Lake Erie & Western Railroad Company. Mr. Palmer was traffic manager of the Havemeyer & Elder Sugar Refinery, now incorporated in the American Sugar Refining Company. He was also the manager of the docks known as Palmer's Docks, now used as the Brooklyn Eastern District Terminal and enjoying one of these lighterage arrangements. Mr. Havemeyer was the owner of the Havemeyer & Elder Sugar Refinery and also of these docks. The contract by which Palmer became the lighterman of the New York, Lake Erie & Western Railroad Company contained as one of its stipulations:

"The party of the first part (Lowell M. Palmer) agrees that during the continuation of this contract he will give to the second party the exclusive transportation on its line of railroad and connections, all the east and west bound freights destined to points upon the railroad of the second party, or which can be reached by the railroad of the second party and its connections which he can influence or control."

The compensation under this contract was the sum of 4 1/5 61 cents for each 100 pounds of freight transferred in either direction by the lighterman.

It needs but slight experience with the rebating contracts into which the carriers were forced by large shippers prior to effective supervision under the act to regulate commerce to enable one to recognize the above as a sale of tonnage, by which one shipper of sugar was placed at an advantage over all other shippers not enjoying like or equal privileges.

The commission also knows that the relationship between the American Sugar Refining Company and the Brooklyn Eastern District Terminal is still potent to add to the earnings of the latter.

In the investigation of this commission, In the Matter of Allowances for Transfer of Sugar, it was testified by the freight traffic manager of the Pennsylvania Railroad that it made the allowance to the Brooklyn Eastern District Terminal because the people who controlled that terminal also controlled the routing of the sugar of the American Sugar Refining Company. I quote from the record in that case:

"Q. You have a terminal of your own near by the Brooklyn Eastern Terminal, I believe?

"A. Yes, sir.

"Q. Then why do you handle sugar from the Eastern District Terminal?

"A. That is rather a difficult question to answer.

"Q. Is it in order to handle sugar?

"A. Yes, sir.

"Q. In order to get the sugar to handle?

"A. Yes, sir.

"Q. And if you did not handle through the Brooklyn Eastern District Terminal, it is your theory that you would not get it to handle?

"No; I do not think we would.

62 "Q. That is because the Brooklyn Eastern District Terminal people, the people who control that terminal, also control the routing of the sugar, is it not?

"A. Yes, sir.

"Q. And you have the routing through their terminal and make the lighterage payments to them in order to get the tonnage?

"A. That is my understanding."

So far as Arbuckle Brothers are concerned no question can exist of the relationship of the lightermen and the sugar shipper for the reason that one partnership alone is involved, and this case might well turn upon the discrimination enjoyed by that firm. The commission has good reason to believe that the arrangement by which, when they began competition with the Havemeyer interests in the year 1898, Arbuckle Brothers became lightermen for the various railroads, was entered into by the railroads in response to the demand of the new sugar refiners and shippers that they should enjoy equally as favorable relations with the railroads as were enjoyed by their long-established competitors. The arrangement with Arbuckle Brothers, therefore, may be said to have been entered into in order to prevent a discrimination between them and the American Sugar Refinery Company. It follows, however, that these arrangements give them the same advantage over sugar shippers not enjoying such arrangements as were previously possessed by the Havemeyer interests.

It is asserted in the majority report that "section 15 of the act clearly implies that a just and reasonable allowance may be made to the owner of property transported when such owner renders a service connected with or furnishes an instrumentality used in the transportation." So far from fortifying the view of the majority, the reference to that provision in the act rather emphasizes the wrong to the complainant in the present situation. For if the carriers make an arrangement with Arbuckle Brothers that permits them to render a service and furnish an instrumentality by which their sugar is delivered to the defendants at the Jersey City terminals and make an allowance to them therefore, under every principle of equality embodied in the act the defendants must offer the same privilege to the complainant; and if the complainant renders a like service and furnishes a like instrumentality in getting its sugar to the defendants at Jersey City, it is clear that it is entitled to a like allowance. The complainant owns an extensive dock at Yonkers adjoining its refinery, and it hires lighters to move its sugar to Jersey City. It renders precisely the same service and uses precisely the same instrumentalities in connection with its sugar that Arbuckle Brothers use in delivering their sugar at the Jersey City terminals of these defendant carriers. And it needs no argument to demonstrate that when one shipper, upon the delivery of his sugar to the defendants at Jersey City, receives a substantial allowance, while another shipper, upon delivering his sugar at Jersey City, receives no allowance, the result is an unjust preference of the one and an undue discrimination against the other.

In a word, as between two shippers competing in the same line of business, a carrier may not lawfully discriminate under a contract of this nature even when entered into in good faith in order to supply itself with needed facilities. If such an allowance is made to one shipper for the service rendered and instrumentalities furnished by him in getting his sugar into the hands of the defendants at

Jersey City, it is unlawful to withhold a similar allowance
64 from the complainant for doing precisely the same thing with its sugar. The fact that its refinery is outside the lighterage limits is of no significance. The burden of its additional distance is its misfortune. But it is entitled to deliver its sugar into the possession of the defendants at Jersey City upon exactly equal terms with Arbuckle Brothers. If the trunk lines do not see fit to extend their services to Brooklyn with their own equipment but choose to farm out that service to the concerns controlling the immense sugar tonnage to the westward (which it has been testified by Vice President Caldwell, of the Delaware, Lackawanna & Western Railroad, is 30 per cent. of the total tonnage westbound out of Greater New York), then they should be compelled to so adjust the arrangement that no discrimination will be caused by it.

What is here said must not be construed as an indorsement of the system of rate making by allowances, instead of by net rates. It is a condemnation of the still more pernicious system of discriminative

rate making by means of allowances so contrived as to be open to only a portion of the shippers.

I am authorized to say that Commissioners Clements and Harlan join in the views herein expressed.

65

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 24th day of June, A. D. 1909.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockerell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

FEDERAL SUGAR REFINING COMPANY OF YONKERS

vs.

| No. 1082.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed without prejudice.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled "Report and order of the commission" are true copies of the originals now on file in the office of this commission.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the commission this 13th day of July, 1909.

[SEAL.]

E. A. MOSELEY, *Secretary.*

66

EXHIBIT "E."

Before the Interstate Commerce Commission.

FEDERAL SUGAR REFINING COMPANY, COMPLAIN-

ant,

vs.

BALTIMORE & OHIO RAILROAD COMPANY; CENTRAL

Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railroad Company, and The Pennsylvania Railroad Company, defendants.

| Docket No. 2888.

The petition of the above-named complainant respectfully alleges and shows:

I. That complainant is a corporation organized and existing under the laws of the State of New York; that it has offices at 138 Front

Street, in the Borough of Manhattan, city of New York; and that it is engaged in refining sugar and shipping the same between points in different States in the United States.

II. That defendants are common carriers engaged in the transportation of property by railroad between points in different States in the United States, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4th, 1887, and acts amendatory thereof and supplementary thereto.

III. That the rail terminals of the defendants are located on the New Jersey shore of the Hudson River, except that of the defendant The Baltimore & Ohio Railroad Company, which is located at St. George, Staten Island.

IV. That the complainant is located within the free lighterage limits established by the defendants, having its office at 138 Front Street, Borough of Manhattan, city of New York; that it bills its through shipments from said office; that the interstate transportation of its product, under such through billing, begins at Pier 24, North River, Borough of Manhattan, whence it is lightered by the complainant and delivered to the defendants at their rail terminals aforesaid, for transportation under said through billing, at the New York rate.

V. That John Arbuckle and William A. Jamison are copartners engaged in the business of manufacturing and dealing in sugar under the firm name of "Arbuckle Brothers" and having a principal place of business at No. 71 Water Street, Borough of Manhattan, city of New York.

VI. That the said John Arbuckle and William A. Jamison, as copartners, conduct a terminal and lighterage business under the name of "Jay Street Terminal," owning, maintaining, and operating in connection therewith an extensive water front and docks adjacent to their refinery at the foot of Jay Street, Borough of Brooklyn, together with tug boats, car floats, and the usual appurtenances for receiving, handling, and transporting freight by water.

68 VII. That the product of the sugar refinery operated by the said John Arbuckle and William A. Jamison under the name of "Arbuckle Brothers" is lightered or floated in their own equipment from their dock at the foot of Jay Street, aforesaid, by the said Arbuckle and Jamison operating under the name of "Jay Street Terminal," and delivered to the defendants at their rail terminals aforesaid, for transportation at the New York rate.

VIII. That the respective initial points of the said lighterage service, that is to say Pier 24, North River, and Jay Street, are within the free lighterage limits aforesaid.

IX. That the complainant and the said Arbuckle and Jamison lighter their product from said initial points to the aforesaid rail terminals of the defendants, at their own expense and risk.

X. That the complainant and the said Arbuckle and Jamison perform substantially the same service in the lighterage of their respec-

tive products from the said initial points to the rail terminals of the defendants.

XI. That for lightering their product from Jay Street to the rail terminals of defendants as aforesaid, the said Arbuckle and Jamison are paid by the defendants at the rate of 4½ cents per 100 pounds on shipments destined to points west of the western termini of the trunk lines, including Buffalo and Pittsburg, and 3 cents per 100 pounds on shipments destined to points east of said western termini.

XII. That the defendants refuse to make any compensation to the complainant for lightering its product from Pier 24, North River, to the rail terminals of the defendants.

69 XIII. That the said Arbuckle and Jamison are competitors of the complainant in the sugar business and market their product in competition with and in the territory served by the complainant.

XIV. That, by reason of the premises, the defendants have been and are charging complainant unjust and unreasonable rates for transportation over their lines from their said rail terminals; and have been and are charging, collecting, and receiving from the complainant a greater compensation for transporting its sugar than they have been and are charging, collecting, and receiving from the said John Arbuckle and William A. Jamison for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; and have been and are subjecting complainant and its traffic in sugar to an undue and unreasonable prejudice and disadvantage in favor of the said Arbuckle and Jamison; all of which is in violation of the act to regulate commerce, as amended, and more particularly sections one, two, and three thereof.

XV. That the facts above set forth have existed since the 20th day of July, 1909, wherefore the complainant has been compelled to pay to the defendants, from the said date to the 1st day of September, 1909, an excess charge on its shipments of sugar, amounting to two thousand two hundred and forty-three dollars (\$2,243), as more fully appears in Schedule A, hereunto annexed, and which is to be taken as a part of this petition.

Wherefore, complainant prays that defendants be required promptly to answer the charges herein; that after due hearing an order be made commanding said defendants wholly to cease 70 and desist from the aforesaid violations of the act to regulate commerce, as amended, and to pay to complainant, by way of reparation, said sum of two thousand two hundred and forty-three dollars (\$2,243), or such other sum as the commission may upon the proof to be adduced herein find complainant entitled to recover; and further that an order be entered requiring defendants to grant to the complainant the same privilege of lightering its product from a point within free lighterage limits to the rail terminals of the defendants, and the same compensation therefor, as have been heretofore and are now granted and allowed to the said John Arbuckle and

William A. Jamison, in regard to their shipments of sugar lightered by them from Jay Street to the rail terminals aforesaid; and that such other and further orders may be entered as the commission may deem necessary in the premises and the complainant's cause may require.

Dated at 138 Front Street, Borough of Manhattan, city of New York, September 29, 1909.

FEDERAL SUGAR REFINING COMPANY,
By C. A. SPRECKELS, President.

ERNEST A. BIGELOW,

Attorney for Complainant,

15 William Street, New York City.

SCHEDULE A.

Being a statement of excess charges demanded, collected, and received from the complainant during the period from July 20th to September 1st, 1909, as follows:

1. By the defendant The Baltimore & Ohio Railroad Company:	
2,119,694 lbs., at 3c	\$635.89
42,124 lbs., at 4 1/5c	17.69
	\$652.58
2. By the defendant The Central Railroad of New Jersey, 132,060 lbs., at 3c	39.62
3. By the defendant The Delaware, Lackawanna & Western Railroad Company, 37,282 lbs., at 3c	11.18
4. By the defendant The Erie Railroad Company, 160,808 lbs., at 3c	48.25
5. By the defendant The Lehigh Valley Railroad Company, 297,867 lbs., at 3c	80.36
6. By the defendant The New York, Ontario & Western Railway Company, 74,355 lbs., at 3c	22.49
7. By the defendant The Pennsylvania Railroad Company, 4,625,086 lbs., at 3c	1,387.52
Total	\$2,243.00

EXHIBIT F.

Before the Interstate Commerce Commission.

FEDERAL SUGAR REFINING COMPANY OF YONKERS,

vs.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Docket No. 2888.

Erie Railroad Company, answering the complainant's petition herein, respectfully states:

First. On information and belief this respondent admits the allegations in Paragraph I of said petition.

Second. This respondent admits that it is a common carrier engaged inter alia in the transportation of property by railroad between points in the States of New York, New Jersey, Pennsylvania, and Ohio, and that as such common carrier it is subject to the act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto, insofar as said act

and its said amendments and supplements are in conformity with the Constitution of the United States.

Third. This respondent admits that it maintains a station in Jersey City, New Jersey, at which it receives freight for transportation as a common carrier as aforesaid, and from which it makes

73 delivery of freight which it has so transported; it denies that it is advised or that it has been able to ascertain what

complainant means by the use of the term "rail terminals" as used in Paragraph III of said petition, and it is therefore unable to make specific answer to the allegation with reference thereto contained in said paragraph, but it avers that in addition to the station maintained by it in Jersey City, New Jersey, as aforesaid, it also maintains various other stations in and about New York Harbor located at certain points in the Boroughs of Manhattan, Brooklyn, and Bronx, in the city of New York, as appears in the tariffs duly filed by it with the Interstate Commerce Commission and published according to law; that at those stations it also receives freight for transportation, and that from those stations it makes delivery of freight which it has transported, and it further avers that within certain of those terminal stations are maintained rails and tracks over which engines and cars are operated by it for beginning and completing the transportation of freight handled by it through such stations.

Fourth. On information and belief this respondent admits that complainant has an office at 138 Front Street, Borough of Manhattan, city of New York, and it avers that complainant's refinery is located at Yonkers, New York, a point outside the lighterage limits of New York Harbor. On information and belief it avers that, as complainant alleged in Paragraph I of its petition in the former proceeding before this commission, Docket 1082, complainant's principal place of business is at Yonkers; that the interstate transportation of the product of complainant's refinery actually begins at Yonkers, New York, and that the alleged arrangement whereby the product

74 of complainant's refinery is said to be billed from complainant's office at 138 Front Street, New York City, and the interstate transportation of said product is alleged to begin at Pier 24, North River, Borough of Manhattan, is a mere subterfuge, and that such interstate transportation does not in fact begin at Pier 24, North River. On information and belief this respondent further avers that the aforesaid alleged arrangement has been adopted by complainant in part for the purpose of evading the decision of this commission in the former proceeding, Docket 1082, and in part to provide a basis for the instituting of this proceeding.

Fifth. On information and belief this respondent admits the allegations contained in Paragraph V of said petition.

Sixth. On information and belief this respondent admits that John Arbuckle and William A. Jamison are the members of a copartnership conducting a terminal and lighterage business under the firm name and style of "Jay Street Terminal"; that the docks of said

Jay Street Terminal are located at the foot of Jay Street, Borough of Brooklyn, and that said docks are in the vicinity of the sugar refinery owned and maintained by the firm of Arbuckle Brothers, and it admits that said Jay Street Terminal has the necessary and adequate equipment for conducting said terminal and lighterage business and for receiving, handling, and transporting freight by water.

Seventh. This respondent avers that the aforesaid Jay Street Terminal is a public station regularly designated by this respondent in its tariffs as a place for the receipt and delivery of freight; that in its said tariffs it duly prescribes rates for the transportation of freight to and from said station; that at said station it receives

freight from and delivers freight to the general public, including

75 Arbuckle Brothers and that while the physical transportation of freight offered at and delivered from said station between said Jay Street Terminal and this respondent's station in Jersey City is performed in the lighters of and by the tugs of said Jay Street Terminal, the transportation of such freight is actually performed by this respondent through the agency of said Jay Street Terminal; and that for conducting the said public station, collecting charges from the public, and performing said transportation between Jay Street Terminal and this respondent's Jersey City Station for it this respondent pays to said Jay Street Terminal the rates of compensation as stated in Paragraph XI of said petition.

Eighth. This respondent admits that Pier 24, North River, and Jay Street Terminal are within the free lighterage limits of New York Harbor, but it denies that the initial point of the transportation of the products of complainant's refinery is now at said Pier 24, North River, and avers that said initial point of shipment is the same to-day as it was when the prior proceeding under Docket No. 1082 was brought before this commission, to wit, Yonkers, New York, where complainant's refinery is situated.

Ninth. This respondent denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph XIII of said petition, and therefore prays that if said allegations be denied to be material, complainant be required to make due proof thereof.

Tenth. This respondent admits that it refuses to make any compensation to complainant for lighterage the product of complainant's Yonkers refinery alleged to be lightered from Pier 24, North River.

76 Eleventh. This respondent denies that complainant's petition or Schedule A thereof contains sufficient information to enable it to determine whether between July 20th, 1909, and September 1st, 1909, it transported for complainant the quantity of sugar referred to in said Schedule A, and it avers that it will continue to be unable to determine whether it did perform said transportation as long as complainant fails and neglects to furnish specific billing references to the shipments of sugar referred to in said Schedule A, or with sufficient information to enable it to locate record thereof; but it avers that if during said period it did perform such transpor-

tation, it did so at the rates and under the regulations prescribed in the tariffs duly filed by it with the commission and published according to law, and this respondent denies that it has unduly or unjustly discriminated against complainant in violation of the act to regulate commerce or its amendments or supplements, as is alleged in said petition or otherwise.

Twelfth. This respondent denies each and every other allegation in said petition which has not hereinbefore been specifically admitted or denied or otherwise answered unto.

Thirteenth. This respondent avers that complainant's said petition raises questions which have been determined against complainant in a proceeding before this commission, entitled "Federal Sugar Refining Company of Yonkers versus Baltimore & Ohio Railroad Company and others, Docket No. 1082," decided June 24th, 1909, and that the petition herein contains no allegations which were not before this commission in that proceeding and therein passed upon by it with the exception of the allegation that the interstate transportation of complainant's shipments originates at Pier 24, 77 North River, which allegation this respondent avers to be irrelevant and immaterial and not in accordance with the facts as above set forth.

Wherefore, Erie Railroad Company prays that as to it complainant's prayer for reparation be denied; that complainant's petition be dismissed and that this respondent have such other and further relief as this commission may deem to be just and reasonable.

New York, N. Y., October , 1909.

ERIE RAILROAD COMPANY,
By D. L. GRAY,

Asst. Atty. Traf. Manager.

GEO. F. BROWNELL,
Attorney for Erie Railroad Company.

EXHIBIT "G."

Before the Interstate Commerce Commission.

FEDERAL SUGAR REFINING COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY ET AL. } No. 2888.

Decided December 5, 1910.

Report and order of the commission.

FEDERAL SUGAR REFINING COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY ET AL. } No. 2888.

Submitted April 13, 1910. Decided December 5, 1910.

1. A carrier is not warranted under section 15 of the act in making an allowance to one shipper who provides a facility and performs a service in the transportation of his own property, while refusing a

similar allowance to another shipper, competing in the same markets and in the same line of business, who provides a similar facility and performs the same service in the transportation of his property.

79 2. The allowances paid by the defendants on the sugar brought by Arbuckle Brothers on floats and lighters to their regular freight stations on the Jersey shore, no allowance being paid to complainant on sugar brought by it on lighters to the same stations, result in inequalities, preferences, and discriminations and are unduly prejudicial to the complainant as a shipper over the defendants' lines in competition with Arbuckle Brothers in the same markets.

3. The fact that Arbuckle Brothers operate their dock in Brooklyn as a terminal for the defendants does not justify an allowance to them for lightering their sugar to the regular stations of the defendants on the Jersey shore so long as an allowance to the complainant for lightering its sugar to the same stations from Pier 24 is refused.

4. A receiving station operated for carriers by a competitor in the same line of business is not a reasonable facility of transportation to offer a shipper.

Ernest A. Bigelow for complainant.

H. A. Taylor, Douglas Swift, and Edgar H. Boles for defendants.

REPORT OF THE COMMISSION.

HARLAN, Commissioner:

The general facts involved in this controversy were first brought to our attention in a proceeding under the same title reported in 17 I. C. C. Rep., at p. 40, where the commission was divided, one member supporting the order then entered on the special grounds explained in his concurring opinion, while three members joined in a dissenting opinion. This complaint, presented not as a supplemental 80 petition in the first proceeding, but as an original complaint, comes before us on an additional record and upon a new state of facts. We are also asked in this connection to consider a petition for a rehearing of the former complaint.

A careful examination of the report of the majority in the original case and of the concurring and dissenting opinions will conduce to a more accurate understanding of the case as well as the grounds on which were based the divergent views entertained in the commission upon the facts then before us. In disposing, however, of this new complaint it is our purpose to state the facts as they now appear and to consider the case *de novo* and upon the record as it now stands.

Among the several corporations and copartnerships engaged in the refining of sugar in and about the harbor of New York City the only ones that we are concerned with at this time are the complainant and a copartnership widely known as Arbuckle Brothers, which owns an extensive property at the foot of Bridge Street in the city of Brooklyn having a frontage of 1,200 feet on East River and locally known among the shippers that use it as the Jay Street Terminal of the de-

fendants. Under a contract with the defendant carriers Arbuckle Brothers operate the property as a freight station for the defendants. For that use of the dock, and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from 3 to 4½ cents per 100 pounds on all merchandise passing through the terminal, whether inbound or outbound. The floats and barges used in this service are owned by Arbuckle Brothers and 81 all persons employed in the handling of the freight, on the water as well as on the dock, are on the pay rolls of that firm.

The property immediately adjoining the dock property is also owned by Arbuckle Brothers, and on it they have erected a large sugar-refining plant. No less than one-third of all the merchandise handled through the dock by Arbuckle Brothers in their capacity, as is here contended, as agents of the defendants, is sugar manufactured and owned by Arbuckle Brothers in their capacity as refiners and shippers of sugar. As shippers Arbuckle Brothers daily deliver at the Jay Street Terminal a large tonnage of refined sugar for carriage to various interstate points of consumption. It is contended here that they receive their own sugar on their own dock as agents of the defendant carriers. In lighters, or on floats, owned by them but which, it is claimed, they operate as agents of the defendants, they carry their own sugar thence to the regular freight-receiving stations at the rail ends of the defendants on the Jersey shore. On every 100 pounds of sugar thus delivered at the Jay Street Terminal by Arbuckle Brothers, as shippers, to Arbuckle Brothers, as agents of the defendant carriers, and lightered by them in the latter capacity, as is contended, across the river to the defendants' depots, Arbuckle Brothers receive, as heretofore stated, an allowance of from 3 to 4½ cents. They receive similar allowances on the merchandise of other shippers handled through the Jay Street Terminal in the same manner. It may be well here to add that the defendants assert that the Jay Street dock was made a railroad terminal in order to provide a freight station for the shipments of manufacturers and merchants in Brooklyn who have no dock of their own. And it is true that a substantial tonnage, said to be about two-thirds of the total tonnage now passing through the terminal, is of that character.

82 The complainant, the Federal Sugar Refining Company, is also a refiner of sugar and competes with Arbuckle Brothers in supplying that commodity to consumers in the interstate communities reached by the defendants and their connections. Its refinery is located at Yonkers. Adjacent to and connected with it the complainant owns a pier or dock. Yonkers, however, is outside the lighterage limits established by the defendants in New York Bay and the two rivers, which together form what we have referred to as the harbor of New York; and the complainant therefore does not enjoy from its dock the benefit of the free-lighterage service offered by the defendants, under their tariffs, to shippers to and from piers that are within the

limits. It is said that the complainant may reach the destinations in question, and in most instances at the same rates, by delivering its sugar to the New York Central at Yonkers, whence it can be carried to Sixtieth Street and floated across the harbor to the receiving stations of the defendants on the west side of North River. It is asserted, however, and this we take to be established of record, that, for various reasons and because of delays in the handling of shipments, the complainant has found by actual experience that it can not successfully meet the requirements of its patrons by using that route. And it has been compelled to find other means for delivering its refined sugar to the defendants at Jersey City. It has therefore entered into an arrangement with the Ben Franklin Transportation Company for lightering its sugar to the same freight depots of the defendants west of the river to which Arbuckle Brothers lighter their sugar.

Under the arrangement in effect at the time its first petition 83 was before us, the sugar was lightered by the Ben Franklin Transportation Company directly from the complainant's dock at Yonkers to the defendants' freight depots on the Jersey shore. But since our report in that proceeding was announced the method of handling the traffic has been changed, and the arrangement upon which this complaint is based was agreed upon and carried into effect by the two companies. It becomes necessary, therefore, at this point to explain the conditions under which the complainant's sugar now reaches the defendants at their receiving stations west of the river.

Since its incorporation in 1907 the complainant has maintained its general offices at 138 Front Street, in the city of New York, where all its accounts and records are kept, except such as pertain to the actual operation of the refinery at Yonkers. Here its president and other executive officers and their subordinates are located and the actual business of the company is conducted. The only employees at the refinery are those engaged in the operation of the plant, including the superintendent, the checkers, weighers, samplers, shipping clerks, etc. The books kept at the refinery are tally books, weighers' books, samplers' books, records of meltings, and similar documents and papers that pertain to the actual conduct of the refinery. The records of the financial operations of the company, the sales of its products, and all its general correspondence are kept at the general offices.

For fifteen years the Ben Franklin Transportation Company has been a lessee of a portion of Pier 24, in North River, at the foot of Franklin Street, the other portions of the pier being rented to 84 other water lines. It is an independent company engaged in a general lighterage and towing business on the Hudson River. It seems not to be affiliated, either in fact or in origin, with the complainant and to have no intercorporate relations with it. One of its officers is said to own 10 shares of the common stock and 170 shares of the preferred stock of the complainant company. With that exception, which may be disregarded as having no significance, the only relation between the two enterprises rests on the contract

between them under which the transportation company undertakes to lighter the sugar of the complainant, first to Pier 24 and thence, as it may be directed, to the Jersey City terminals of the defendants and to receiving stations of other water and rail lines. This work is carried on by it substantially as follows:

A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece, and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is

there made fast to the dock and notice of its arrival is given at 85 the general offices of the complainant. Thereupon the com-

plainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo, by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman.

For its services in taking the sugar first to Pier 24 and then, after receiving instructions and the bills of lading, in carrying it across the river and making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds. As Arbuckle Brothers receive from the defendant carriers an allowance of from 3 to 4½ cents per 100 pounds upon delivering their sugar across the river at the same freight depots, the complainant contends that the defendant carriers subject it to an unlawful discrimination when they decline to make it similar allowances for delivering its sugar to the defendants at the same place and in the same manner. That is the point of controversy to which our attention has been directed in both these proceedings. On the record in the former proceeding, as heretofore explained, it appeared that the lighterage movement commenced at Yonkers, which is outside the lighterage limits. On the record now before us the complainant contends that the lighterage movement to the receiving stations west of the river commence at Pier 24, where the complainant gives its 86 shipping instructions to the lighterage company. Without entering here upon any discussion of the importance of

the fact in the disposition of this proceeding, it will suffice to say that we accept the complainant's contention that the sugar is now being lightered to the defendants at Jersey City from Pier 24, which is inside the lighterage limits. The lighter is actually made fast to that pier when it arrives from Yonkers; sometimes a portion of its cargo is discharged there and held in storage, presumably for local use; the lighterman has no authority to go further for any instructions for a further movement, and must wait there for authority and instructions; upon receiving orders he lighters the cargo as directed, sometimes to one station and sometimes to another, the cargo not infrequently being divided among the several receiving stations across the river, or being delivered to water lines or railroads other than the defendants, all in accordance with the instructions received at Pier 24.

The one fact that stands out prominently upon this statement of the case is that it costs the complainant 3 cents per 100 pounds to tender its sugar to the defendants at their regular receiving stations on the Jersey shore, being the points where the actual rail transportation begins, while the defendants relieve Arbuckle Brothers of any such expense by paying them the ample allowances heretofore mentioned. Around this fact the whole controversy turns. As manufacturers and shippers of sugar, the complainant and Arbuckle Brothers are competitors in the markets reached by the defendants. Under the arrangement heretofore described the defendants return to Arbuckle Brothers the full cost, and apparently something more than the cost, of lightering their sugar across the river. They refuse to bear this burden for the complainant. And the question is whether this condition of affairs, as between the two competing shippers, results

87 in undue and unjust prejudice and disadvantage to the complainant. In its actual financial and commercial results there can be no doubt that the complainant is at a disadvantage in competition with Arbuckle Brothers with an adverse margin against it of from 3 to $4\frac{1}{2}$ cents per 100 pounds. But is it as a matter of law such an undue and unjust prejudice and discrimination as is condemned and made unlawful by the act?

In support of the agreement between the defendants and Arbuckle Brothers it is urged that the defendants require a freight station on the Brooklyn shore, and that the dock belonging to Arbuckle Brothers is well situated for the purpose, and is, and has been, and in the future will continue to be, a convenience to shippers. This may be conceded without being conclusive either as to the legality or the good faith of the relations at present subsisting between the defendants as carriers and Arbuckle Brothers as shippers. In the past, as we know from various investigations and from an examination of old tariffs, Havemeyer & Elder, the predecessors of the American Sugar Refining Company, the dock of which is also involved in this proceeding, for many years enjoyed illegal preferences at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries these

allowances were extended to them, apparently under some sort of verbal arrangement. It was not until after the enactment of the so-called Elkins law that the lighterage allowances on sugar from the Arbuckle piers seem to have been published. They were then limited to sugar and coffee, being the commodities in which Arbuckle Brothers were interested; and they were paid, as the tariff states, "on account of the peculiar physical situation at the water front adjacent to the Arbuckle refinery," a statement that has not been satisfactorily

explained to the commission although commented upon at the 88 hearing. The allowances at both piers seem therefore to have

had their origin in an unlawful preference of these great shippers. Apparently it was not until some years afterwards that the two piers were made public receiving stations of the defendant carriers. And it is sought to justify the allowances now paid to Arbuckle Brothers and the withholding of similar allowances to the complainant, on the ground that a substantial use is now made of the Arbuckle dock as a public terminal for handling the traffic of other shippers. It is contended that the allowances are unobjectionable at this time, either upon moral or legal grounds, because Arbuckle Brothers, as agents of the defendants, are now handling the merchandise of other shippers through their dock, and therefore may lawfully receive allowances on their own shipments as well as upon the shipments of others.

It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic. As is pointed out in the dissenting opinion in the first of these proceedings (17 I. C. C. Rep., at p. 51), an instance of this nature was developed in the investigation entitled "In the Matter of Allowances for Transfer of Sugar," 14 I. C. C. Rep., 619. It appeared in the course of that inquiry that the Pennsylvania Railroad Company has a wharf in Brooklyn immediately adjoining the Brooklyn Eastern District Terminal, a property of the Havemeyers, who were said to be closely affiliated with the American Sugar Refining Company. This dock will be considered later in this report. It will suffice at this point to say that, in the investigation referred to, the freight-traffic manager of the Pennsylvania Railroad Company frankly admitted that his company, notwithstanding the proximity of its own dock, had

made the Brooklyn Eastern District Terminal its terminal 89 also and in order to get a share of the sugar tonnage of the Havemeyer refinery, had agreed to pay lighterage allowances on sugar shipped from that dock. Defining the transaction in the plainest terms the Pennsylvania Railroad Company simply purchased its part of the traffic of that very extensive shipper; and, in view of the allowances then being made by other carriers, it could get a portion of the tonnage in no other way. This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly

established by the records of the commission, namely, that the allowances were originally extended to these large shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated, in the published tariffs of the defendants, as railway terminals, and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them.

These dock properties may make convenient terminals for a substantial amount of general traffic, but it is somewhat singular that with the entire Brooklyn river front available, and much of it equally convenient, the two docks, one directly owned by Arbuckle Brothers and the other by persons having supposedly very close relations with the American Sugar Refining Company, apparently the only sugar refineries now in operation in Brooklyn, should have been selected for railroad terminals. The explanation lies undoubtedly in the fact that sugar moves westbound from New York City

in larger volume probably than any other commodity; indeed,
90 we were recently advised in another connection by the well-

informed general counsel of one of these defendants that sugar constitutes almost one-third of all the traffic moving westward from that point of origin. If this estimate is even approximately accurate, it was a traffic that skillful shippers could readily turn to their advantage under the demoralized conditions prevailing when these allowances were first paid. Under the better conditions now generally prevailing it is a traffic that the defendants ought to be prepared to receive and handle with their own facilities. But, instead of acquiring or renting these or similar dock properties and operating them as terminals with their own employees, they have contracted for their operation by these great shippers and interests that are closely allied with great shippers. And, notwithstanding the very extensive fleet of tugboats and barges owned and used by the defendants in the harbor of New York, contracts have also been made with the private interests that own the two docks to do the lightering. It is impossible to conclude on all the information before us that these continued relations between the defendant carriers and great shippers and interests closely allied and largely identified with great shippers, are wholly disinterested, however much of a convenience the docks may now be to some of the general shipping public.

It is also urged that the investment of Arbuckle Brothers in their dock property approximates \$1,200,000, and that the net earnings from its operation in 1907 as a terminal for the defendants amounted to but \$35,566.84, this being only slightly in excess of 3 per cent. on the investment, nothing being allowed for interest and depreciation. Net earnings, as everyone knows, vary with the character and extent

of the items embraced on the expense side of the account.
91 But the accuracy of these figures may be admitted without

bringing us any nearer to a solution of the problem presented to us by the complainant. The fact will still remain that Arbuckle Brothers, as shippers of sugar over the lines of the defendants, enjoy a substantial advantage over its competitor, a shipper of sugar over the same lines to the same destinations. As owners of a dock property that is doubtless growing rapidly in value, their arrangement with the defendants enables them to hold and carry it at a substantial net profit and at the same time reimburses them for the cost of delivering their sugar to the defendants on the west shore of the river for carriage to inter-state destinations. The defendants decline to reimburse the complainant for the cost of delivering its sugar at the same receiving stations under substantially similar conditions.

But we are told that if the defendants should now purchase the Arbuckle dock and operate it as a freight station with their own agents and employees and do the floating and lightering across the river with their own equipment, the Arbuckle refinery would still have the advantage of its proximity to the dock and Arbuckle Brothers would still have their lighterage done free of charge, as would all other shippers to and from that terminal, while the complainant would continue under the disadvantage of having to lighter its sugar from Yonkers either to the regular receiving stations of the defendants west of the river or to the Jay Street Terminal or to some other point within the lighterage limits where the sugar would be accessible to the free-lighterage service now performed in New York Harbor by the defendants. And this is regarded as a conclusive demonstration that the discrimination alleged by the complainant can not be undue as this phrase is used in the act. The discrimination, it is said, can not be undue or unjust under the act when by a mere change in the title of the dock property from the alleged preferred shipper to the carrier the discrimination would be eliminated, while the complaining shipper would be left in precisely the position in which it now is. There is only an apparent force, however, in that point of view. As well might it be said that the payment to a shipper of an unlawful rebate is not an undue preference because, if stopped, the competitor will still be under the obligation of paying the lawful rate. Moreover, the tendency of the suggestion is to favor such relations between carriers and particular large shippers, when in the general interest such relations ought to be discouraged. Under that view a carrier desiring the traffic of a large shipper may relieve him of his expense for teaming by making his warehouse a terminal depot and himself an agent for teaming his own shipments to its regular station, as well as the shipments of others that find it convenient to use the new depot. And, as we are told, it would suffice to say of such a condition of affairs that it could be no undue discrimination against the competitors of the favored shipper, because if the ownership of the warehouse should pass from the favored shipper to the carrier

his competitors would still require teams for delivering their shipments either at that depot or at the carrier's regular receiving station.

We can not accept that as a controlling view of such a state of facts as is here shown to exist. A carrier may doubtless wrongfully give a great shipper a substantial advantage by buying or renting his warehouse adjoining his factory or place of business and making it a public receiving station, thus relieving him of the expense of hauling his merchandise by wagon to its regular receiving station. And possibly under the act as it now stands we would be powerless to redress the wrong if the public made actual use of the new station, unless the price paid or the rent reserved were excessive and the transaction was therefore intended as an unlawful rebate as well as a continuing daily advantage to that shipper. But when the carrier engages the shipper to operate his warehouse as a railroad terminal and in the arrangement gives him advantages in handling his own traffic that are denied to his competitor, the test proposed, as above described, does not satisfy the principles underlying the act, as we shall see more fully later in this report.

The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants Arbuckle Brothers perform what the complainant refers to as a purely accessory service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle the sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employees that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants, with respect to the sugar of Arbuckle Brothers, until the defendants have actually received it at their regular freight stations west of the river. Yet it is here con-

44 tended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled, however, by the face of these documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers, if, as seems to be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers up to the movement of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that movement the sugar

is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers. Much therefore may be said in support of the theory that at that point and at that moment is the relation of shipper and carrier between the defendants and Arbuckle Brothers actually established, and that only at that moment of time do the mutual liabilities and responsibilities attending that relation spring into being. When the real essence and meaning of the contracts are arrived at there seems to be no substantial difference in the manner in which the defendant carriers accept the complainant's sugar and the manner in which they accept the sugar of Arbuckle Brothers for transportation. Both companies deliver their merchandise to the defendants on the Jersey shore at their own

95 risk, one from Jay Street and the other from Pier 21, one in

lighters that it owns and the other in lighters that it hires. At that point and at that moment of time the liability of the defendants as common carriers for both shippers commences. Up to that point there is no "transportation" of the sugar, as the complainant contends, but only an accessorial service by each shipper in delivering its own merchandise to the carrier for transportation. It is then that an actual contractual relation between the two refining companies as shippers and the several defendants as carriers is entered into. If therefore we are to disregard, as necessarily we must if this act is to be enforced in its letter and spirit, the merely superficial relation sought to be created on the face of the contracts in question and turn our attention to the actual relation that they establish, the only difference, upon a most careful analysis, between the complainant with respect to its sugar and Arbuckle Brothers with respect to their sugar is that under the contracts Arbuckle Brothers are called the agents of the defendants when handling their own sugar and get an allowance for delivering it to the carriers across the river, while the complainant does the same thing and gets no allowance, but makes the delivery at its own expense. The fact that Arbuckle Brothers ordinarily load their sugar into cars on the dock and sometimes float empty cars across the river for loading seems to be a mere incident to the preferred basis upon which they have been put as shippers over the defendant lines and can not be regarded as materially differentiating them and their sugar from the complainant and its sugar shipments.

"But," say the defendants in substance, "we have converted the dock of Arbuckle Brothers into a regular freight station, and there receive a large tonnage from other shippers which Arbuckle 96 Brothers at our expense lighter to our rail ends west of the river. We shall be glad to have them do this for the complainant, if it will deliver its sugar to us at the Arbuckle dock." This suggestion has not made a favorable impression upon us. To

offer the complainant a receiving station on the dock of powerful competitors, where its shipments would be handled and billed out by the competitors, thus exposing to them the names of the complainant's customers, its markets, and the course of its business, is a suggestion that overlooks the duty of impartial service by the defendants to all their shipping public. Moreover, under recent amendments, the law has thrown its protection around the shipper and in express terms makes it unlawful for an interstate carrier to "disclose his business transactions to a competitor." And if effect is to be given to this wholesome principle the complaint can not be said to be satisfied by the tender to the complainant of the Arbuckle dock as a receiving station for its sugar, and the tender of Arbuckle employees, as agents of the defendants, to make out the lading papers and other transportation records, to assess and collect the freight charges, and to handle the complainant's sugar to the defendants' freight stations on the west shore. To throw a shipper in this manner into the hands of competitors in the same line of business is utterly at variance with fairness as well as with the express provisions of the law. It is true that there may be traffic as to which such a state of affairs would make little difference. But we think it clear that the Arbuckle dock may no more be regarded as a reasonable freight depot for the complainant than would the Brooklyn Eastern District Terminal, operated in the interest of the American Sugar Refining Company, be

tolerated by Arbuckle Brothers as a freight station of the defendants. If its refinery were immediately across the street the complainant could not be expected to accept the Arbuckle dock as a receiving station of the defendants so long as it is operated by competitors in the same line of business. A receiving station operated by a competitor is not a reasonable facility of transportation to offer to any shipper.

So far as the general shipping public is concerned, the Arbuckle dock may doubtless now be regarded as a public receiving station of the defendants. But if, for the reasons stated, it is not entitled to be regarded as a public receiving station so far as the complainant and its sugar are concerned, may it be regarded as any other than the private dock of Arbuckle Brothers when they, as shippers, and their own sugar are concerned? If it is operated under conditions that prevent it from being a legal receiving station for all shippers of sugar that might care to use it, we do not see how it may fairly be regarded as a public receiving station of the defendants for the sugar of Arbuckle Brothers. We have therefore been inclined, as heretofore stated, to regard the lightering of their own sugar across the river as an accessorial service by Arbuckle Brothers from their private dock, and not as a service of transportation from a public receiving station of the defendants. And this view of the matter is emphasized by the contracts, heretofore alluded to, which attach to the defendants a liability as common carriers of Arbuckle sugar only from the moment of time when they actually receive possession of it at their regular station west of the river. It is not necessary, how-

ever, to draw fine distinction between an accessorial service and a service of transportation, as applied to the facts in this case. If the allowances made by the defendants subject the complainant to an undue discrimination, or give Arbuckle Brothers, their competitors, an unjust preference, a wrong is being done that must be redressed by an appropriate order, whether the allowances are paid as for an accessorial service or for a service of transportation. We shall therefore now consider the matter briefly from the latter point of view.

Arbuckle Brothers not only operate their dock for the defendants as a railway facility but they also perform the lighterage service between the dock and the regular stations of the defendant on the west shore. And the defendants insist that the sugar of Arbuckle Brothers, like the general merchandise of other shippers received at their dock, commences to move at that point; and that when Arbuckle Brothers lighter their own sugar across the river they are simply performing a service of transportation with facilities of their own furnished by them for the purpose. The defendants point out that the only way they have of serving the cities of New York and Brooklyn is by a lighterage system radiating to all points within the limits that they have established in the harbor of New York; and that under their lighterage tariffs they are common carriers to and from every dock and pier within those limits. Their view, then, is that the Arbuckles have the right, instead of using their own dock, to tender their sugar to any one of the defendants at any other dock, whether public or private, within the established limits; and to require that defendant, upon the payment by them of the New York rate, to float or lighter it to its regular receiving station on the Jersey side; and therefore if the defendants, by their published tariffs, have placed themselves under the duty of lighterizing the Arbuckle sugar from the New York side at the New York rate, that service, when performed

99 by one of the defendants, is a part of its transportation service from that side of the river. The conclusion necessarily following these premises, as the defendants thereupon insist, is that the lighterage when performed by the Arbuckles themselves, is also a service of transportation and not an accessorial service, and therefore may be paid for by the defendants under section 15 of the act on a just and reasonable basis.

We had not regarded section 15 of the act as a warrant to a carrier for making an allowance to one shipper providing a facility and performing a service in the transportation of his own property, while refusing a similar allowance to another shipper providing a similar facility and performing the same service in the transportation of his property. Nor had we understood that a carrier, while giving to one shipper the privilege of providing a facility and performing a service in the transportation of his property, could refuse the same privilege to another shipper and compensate the former while refusing any allowance to the latter. Nor is that the law. Certainly it can not be the law when the two shippers are com-

petitors in the same line of business and in the same markets. If the defendants accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege and make a like allowance to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that 100 need not be discussed, for we have found that the complainant now lighters its sugar from Pier 24, which is within the lighterage limits.

The defendants, however, insist that the provisions of section 15 need not necessarily have so broad a construction. Their view is that the privilege of furnishing the facilities and performing a part of the transportation service may be accorded, and the payment therefor made, to one shipper without laying the carrier under the obligation of according the same privilege and making a similar payment to another and competing shipper who provides a similar facility and performs a similar service in the transportation of his property. "If the Jay Street Terminal," they declare, "is to be operated as a public station, the handling of the Arbuckles shipments through the terminal and by the equipment of the terminal (i. e., by the Arbuckles), as all other shipments are handled, must be viewed as a natural incident to that operation." Inasmuch as the Jay Street Terminal has been established "it should be open," they say, "to all shippers without discrimination. * * * To require the Arbuckles to deliver their shipments at some point distant from the terminal, there to be picked up and transported to the Jersey terminal by railroad equipment, would be a strained and unnatural proceeding and a discrimination against the Arbuckles." It would be equally strained, as we are told, to require the defendants, after having made the Arbuckles their agents in operating the Jay Street Terminal, to set aside that arrangement with respect to the Arbuckle sugar and handle it with railroad employees and with railroad equipment. This, they say, would be both inconvenient and expensive. From that point the argument of the defendants proceeds easily and rapidly to the proposition that, when a carrier, by an agreement with a great shipper, turns his dock into a railroad terminal and has it operated for it by the shipper, the circumstances and conditions surrounding that shipper and his particular traffic differ from the circumstances and conditions surrounding another shipper, although competing in the same line of business, "who does not furnish public terminal facilities for the carrier"; and that such a situation justifies the carrier "in permitting the shipper who operates a public terminal for it to perform such ter-

inal service on his own shipments while refusing to permit a shipper who does not operate a public terminal to perform a similar part of the transportation service." In other words, as we gather the point of view of the defendants, the very arrangement that makes a railroad terminal of the dock owned by and adjoining the refinery of these shippers and saves them the cost of teaming or otherwise conveying their immense traffic to a public terminal operated by the carriers themselves also erects around those shippers a bulwark of dissimilar circumstances and conditions that justifies the carrier in giving them the further privilege of providing their own facilities for lightering their shipments across the river, thus performing also a part of the transportation service and being compensated therefor by ample allowances, while the privilege is withheld from another shipper who is their competitor in the same line of business.

That contention can not be admitted as sound. On the contrary, we hold that when a carrier undertakes to have such a terminal operated for it by the owner of the property and the owner happens also to be a large shipper over its line, the law reads into the agreement between the carrier and the owner the peremptory requirement that the arrangement shall not result in any undue and unjust dis-

crimination against other shippers competing with the owner
102 in the same line of business. The prohibition of inequalities

among shippers is perhaps more fundamental and vital than any other feature of the act. And when a carrier undertakes to supply its needs by private contract with a shipper—whatever may be its purpose, and however plainly it may be grounded in good faith, or however clearly it may spring from the practical necessities of the carrier—by giving him certain opportunities and advantages in the handling of his traffic over its lines, those opportunities and advantages may not lawfully be withheld from his competitors. However straightforward the relation between a carrier and a shipper may be, it is essentially wrong, and violates the provisions of the statute against preferences and discriminations, when the carrier endeavors under such a private contract to turn the shipper into its agent, and thus, whether purposely or incidentally, gives him privileges and advantages in connection with the transportation of his property that are withheld from his competitors. If such a transaction is conceived in bad faith and works unlawful results, it is manifestly unlawful. But good faith will not save it from like condemnation if it involves preferences and discriminations that are undue and unjust. It is not the intention of the parties but the actual results that flow from the arrangement that constitute the tests. And we find that the terms under which the defendant carriers accept the sugar of Arbuckle Brothers at their regular stations west of the river do result in inequalities, preferences, and discriminations, and are unduly and unjustly prejudicial to the rights of the complainant as a shipper of sugar over the lines of the defendants in competition with Arbuckle Brothers in the same markets.

We are told that the contention that a discrimination is being practiced against the complainant "could be forcibly urged 103 * * * if the refinery of the complainant had been located within the lighterage limits," and that the "trouble of the complainant springs from its location without the free lighterage limits." So far as the record gives us any light on the matter the complainant is not seeking to ship its refinery over the lines of these defendants; the whereabouts of the refinery is therefore wholly non-essential and of no possible concern to anyone. It is the sugar that the complainant is offering for shipment, and it is offered from a point that is within the lighterage limits. It may have been manufactured in the Philippines, or brought in from Porto Rico, or imported from Germany. This particular sugar happens to have been refined at Yenkers. But wherever it may have been made, the relevant fact from a transportation point of view is that at a given moment a quantity of sugar is at Pier 24 ready for shipment to interstate destinations on the lines of these defendants. It matters not how it got there, whether by lighter or by cart or by wheelbarrow; it is ready for shipment at that point. At the same time a like quantity of sugar is ready at the Arbuckle dock for shipment over the same lines and to compete in the same markets. Under every principle of equality embodied in this legislation the defendants must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way; and if under section 15, or under any other provision of the act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation 104 service for the defendants, they must make a like allowance to the other shipper who has done precisely the same thing. To say that the defendants have made an agent of one shipper to do the lightering for it and have not established that relation with the other serves but to emphasize the discrimination, and seems neither to reach the equity and common justice of the situation, nor to constitute even a superficial compliance with the equality of privilege, service, and rate that the law requires of carriers in their contact with interstate shippers.

The sugar of the two competing shippers gets into the actual physical possession of the defendants on the Jersey shore under practically similar conditions, and if, as the defendants contend, the Arbuckle sugar commences to move at the Arbuckle dock, it must be remembered that the defendants also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If, then, the defendants permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the defendants under their tariffs, it

is difficult to see upon what theory the defendants may defend their refusal to recognize the lighters hired by the complainant as its facilities in performing for the defendants a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers for a service of transportation alleged to be performed by them for the defendants with their own facilities creates a present actual and substantial inequality that is unlawful under the act, when similar allowances are refused to the other and competing shipper for an exactly similar service. The suggestion that if the Arbuckle dock should now be purchased, or rented and operated by the defendants, and if the defendants should use their own lighters in moving the Arbuckle sugar across the river, the disadvantage under which the complainant rests would not be removed, does not meet the conditions that actually exist, and which, in our judgment, present an actual present undue discrimination in the relations of the defendants with the two shippers. The Arbuckle sugar moves either from the Jersey side or the New York side of the river. If its transportation commences at the New York side, as the defendants contend, then it appears that Arbuckle Brothers, besides being paid for using their own dock as a receiving station for their own sugar, are also accorded the privilege of providing the lighters and performing a part of the transportation service on the sugar, namely, from the dock to the regular receiving stations of the defendants west of the river; it also appears that they are well and amply paid for this service and the use of their facilities. The complainant, on the other hand, does precisely the same thing from another dock within the lighterage limits and is refused any compensation at all. That is the actual situation before us as revealed upon the record. And it is that situation with which we must deal. We shall not undertake at this time to consider what rate question or other problem might be presented if the defendants should buy or lease and operate the Jay Street Terminal for themselves and perform the lighterage to and from that terminal with their own equipment and with their own employees. If the present allowances paid to Arbuckle Brothers are a fair measure of what it would really cost the defendants to put the Arbuckle sugar on the Jersey side with their own equipment, the question might arise as to the reasonableness, from the standpoint of these competing refineries, of having identical rates on sugar from both sides of the river. But no such question is before us at this time.

On the whole record we hold that when the complainant, as herein-before described, tenders its sugar to the defendants on lighters at their regular receiving stations on the Jersey shore it must be received and carried thence to destination on rates, terms, and conditions that are no less favorable to the complainant in any particular than the rates, terms, and conditions governing and surrounding the sugar traffic of Arbuckle Brothers brought by them on floats and lighters to the same stations for carriage to the same destination.

The complainant also charges that a similar allowance paid to the owners of the so-called Brooklyn Eastern District Terminal, owned by Havemeyer interests, also subjects it to undue prejudice and disadvantage. It is at this dock that the output of the American Sugar Refining Company is largely handled. But, although our understanding had been to the contrary, we were told at the hearing that the Havemeyers owned only an insignificant amount of the capital stock of that company. Accepting these statements at their face value, we need not at this time consider that phase of the complaint. Nor, in view of our conclusions herein, is it necessary to consider the petition for a rehearing of the former case under this title to which allusion has been made.

An order will be entered in conformity with these conclusions; and upon the filing of a detailed statement properly checked by the 107 defendants a further order will be entered allowing reparation to the complainant in accordance with the prayer of its petition.

KNAPP, Chairman, dissenting:

I do not perceive that the record in this case presents any different question from the one decided in the former case between the same parties, 17 I. C. C. Rep., 40. Indeed, in one aspect the facts now presented seem to me less favorable to complainant, since it appears in this proceeding, by the explicit avowal of its counsel during the oral argument, that the transfer of the Jay Street Terminal to the defendant carriers and its operation by them would result in no benefit to complainant. This being so, as must be assumed from the admission made, I do not see how the ownership and operation of that terminal by Arbuckle Brothers constitutes undue preference to them or undue prejudice to complainant. I therefore dissent upon the general grounds set forth in the majority report in the former case.

PROUTY, Commissioner, also dissenting:

I do not agree to the disposition made of this case, and while the opinion of the Commission in the original case, Federal Sugar Refining Co. v. B. & O. R. R. Co., 17 I. C. C. Rep., 40, gives a correct and perhaps sufficient account of the question presented, I wish to add a word in view of the claim that this record presents a new state of facts.

So far as disclosed there are three sugar refineries in New York and vicinity, namely, the Federal Sugar Refining Company, the complainant, whose factory is located at Yonkers, N. Y., and Arbuckle

Brothers, and the American Sugar Refining Company, the factories of the two latter being located in Brooklyn, N. Y. The complainant contends that the defendants by their rates discriminate against it in favor of its two competitors.

Yonkers, where the factory of the complainant is located, is without the free lighterage limits of New York, while the plants of Arbuckle Brothers and the American Sugar Refining Company are both situated within those limits. The original complaint alleged that

Yonkers should also be included within these lighterage limits, and the discrimination alleged in that complaint was the failure of the defendants to so extend their lighterage service.

Upon a full presentation of the matter the commission held that the New York lighterage limits ought not to be extended to include Yonkers, and that the defendants were within their lawful rights in declining to embrace the factory of the complainant within these limits. This must be kept continually in mind.

It is equally important to have ever in view the full significance of that holding. From all points within the lighterage limits the New York rate of the defendants applies, but that rate does not apply from points without those limits unless the point is located upon the line of some one of the defendants. Under this rule, the propriety of which is unquestioned, the American Sugar Refining Company and Arbuckle Brothers are entitled to have their sugar lightered free at the New York rate to the rail termini of the defendants in Jersey City and Hoboken.

The plant of the complainant at Yonkers is upon the tracks of the New York Central system, and its product for all points reached through that system and its connections can be loaded from the 109 storehouse into the car, but there are many points which can

not be satisfactorily reached by this route, and for which the complainant finds it necessary to make use of the lines of the defendants; and in that event the sugar of the complainants must be transported by lighter from the plant at Yonkers to the rail termini at Jersey City, in the same way that the sugar of its competitors must be lightered from their plants to Jersey City, but inasmuch as its plant is without the free lighterage limits the complainant is put to the expense of that lighter service.

Arbuckle Brothers and the American Sugar Refining Company have therefore a transportation advantage over the complainant with respect to their sugar shipped by the defendant lines through Jersey City, which arises out of the location of their plants and which this commission has held and still holds is legitimate. The Federal Sugar Refining Company has, doubtless, from its location at Yonkers certain advantages over its rivals. Its factory may have cost it less; its rents may be less; it may find labor conditions more favorable. It has immediate access to the rails of one of the great railroad systems of this continent and for all points upon that system or its connections its product can be transferred from the warehouse to the car. But to offset these advantages it labors under the transportation disadvantage of being compelled to lighter its own product to Jersey City, while the product of its rivals is carried free.

It is repeated through page after page of the majority opinion that the complainant is at a transportation disadvantage in comparison with its competitor, Arbuckle Brothers. Most certainly it is, and this commission has held that this disadvantage is not improper.

Starting, then, with the proposition that with respect to all 110 sugar handled over the lines of the defendants through their

rail terminals upon the west bank of the Hudson River, the complainant is properly at a disadvantage as compared with its competitors located in Brooklyn, it may be asked, What further disadvantage against the complainant does the record in this case disclose? If any, it arises out of the following situation:

Arbuckle Brothers own an extensive dock in Brooklyn and the floating equipment for lightering to and from that dock. An arrangement has been made by these defendants with Arbuckle Brothers under the terms of which traffic of all kinds is handled over this dock to and from the rail termini of the defendants at Jersey City. The dock is known as the Jay Street Terminal of these defendants. Arbuckle Brothers are the agents of the various defendants in the operation of that terminal. As compensation for the lightering of this traffic and the transaction of the terminal business connected with receiving and delivering the same, Arbuckle Brothers are paid a fixed sum per 100 pounds, which is 3 cents where the traffic is intended for certain destinations and 4½ cents for certain other destinations.

With respect to this contract certain facts should be noted.

It applies to all traffic of all kinds, both in and out, originating at or intended for that part of Brooklyn. As I remember the testimony about one-third of the outbound traffic consists of the product of Arbuckle Brothers, the other two-thirds being miscellaneous business. A much less per cent of inbound business is for Arbuckle Brothers.

When outbound traffic is presented for shipment over the line of one of the defendants a bill of lading is issued in the name of that defendant. This is, of course, signed by an employee of Arbuckle Brothers for the railroad company, but it is in all respects the act of the company and binding upon it. If, for example, a consignment of sugar were to be offered for shipment by Arbuckle Brothers over the line of one of these defendants and if that sugar were lost in transit from the dock to the Jersey shore, the railroad would be responsible to the consignee for the delivery of the property. Under the contract between Arbuckle Brothers and the railroad, the railroad would have a claim against Arbuckle Brothers for the amount of the loss, but, as between the shipper and the railroad, Arbuckle Brothers are unknown.

The price paid is by the hundred pounds and depends not on the character of the traffic but on the destination, being 3 cents per 100 pounds in some instances, and 4½ cents in others. It is in no sense an allowance to Arbuckle Brothers for the lighterage of their sugar, except as that sugar may constitute about one-third of the total outbound business handled through that terminal.

The case finds, and this is not disputed, that under the actual working of this contract Arbuckle Brothers do not receive an excessive return for the service performed.

Just how, then, does this contract violate the act to regulate commerce?

To permit a shipper to receive from a railroad compensation for any part of the service of transportation undertaken by the railroad is a fruitful source of favoritism and discrimination. This has always been recognized by all students of the subject, and Congress, in view of this fact, might very well have prohibited all transactions of this kind. Had it done so the mere fact that Arbuckle Brothers are the owners of a substantial part of the traffic moving through this terminal would render the operation of the contract unlawful.

112 Congress has not done this. The commission in calling the attention of Congress to the wrongs which grew out of this connection between the shipper and the railroad, itself stated that there might be instances in which it was for the interest of the general public that some portion of the transportation service should be performed by the owner of the property, and that, for this reason, the better way seemed to be to make sure that the compensation paid the shipper for the performance of this service was not extravagant. Whether influenced by this suggestion or not, Congress did, in the Hepburn amendment of 1906, provide that where the shipper rendered a part of the transportation service the commission might inquire what would be a reasonable compensation for that service and fix a limit which should not be exceeded by the carrier, thereby expressly recognizing the right of the carrier to employ the shipper about the transportation of his own property, provided the compensation paid for that service was not unreasonable.

This very instance before us furnishes a good illustration of the necessity for this provision. Dockage property in Brooklyn is extremely valuable, and it might be both difficult and expensive for these various defendants to create proper freight terminals in that locality. This dock with its floating equipment was available. It gave to the public facilities much needed, and it enabled the defendants to provide those facilities on favorable terms to themselves. There is no apparent reason why these defendants should not be allowed to select this economical and efficient method of affording adequate public facilities for receiving and delivering freight in this locality, unless some wrong is done to some member of the shipping public.

113 While, however, it seems plain to me that Congress has not prohibited arrangements of this kind when no element of wrong is involved, I do not think that such a situation is lawful if it creates an undue discrimination in favor of the party who handles the business and receives the compensation, even though the compensation be not excessive. There is, therefore, the further question of fact, Does the operation of this contract give to Arbuckle Brothers an advantage over the Federal Sugar Refining Company? If it does, in my opinion it should be prohibited; if it does not, then in the interest of the public and of these defendants, it should be sanctioned.

It is said that Arbuckle Brothers get free transportation for their sugar from this dock to Jersey City, while the complainant is obliged

to lighter its sugar at its own expense. This certainly is true, but for the reason that the factory of Arbuckle Brothers is within the lighterage limits while that of the complainant is without—a situation which this commission has approved.

It is suggested that Arbuckle Brothers are large shippers, while the complainant is a small shipper. The record does not show the relative shipments of these two refineries; nor did I suppose that this was material. It has been my understanding that under this act which we administer great shippers and small shippers stand exactly alike. I had not supposed hitherto that if a great shipper happened to be located within the free lighterage limits of New York his greatness was a reason for depriving him of the benefit of free lighterage.

It is said that Arbuckle Brothers handle their own sugar. But how does this benefit Arbuckle Brothers, provided the sum which they receive for that service is no more than a reasonable one?

It is urged that the compensation paid is more than is reasonable. It is quite possible that the amount received per 100 pounds for handling this sugar is more than would be just if nothing but the Arbuckle sugar was handled through the Jay Street Terminal, but the contract for the operation of that terminal applies to the entire traffic, of which the Arbuckle sugar is but a fraction. That traffic is of all kinds and the expense of handling some kinds much exceeds that of others. What Arbuckle Brothers gain on sugar is lost on other kinds of business, provided the entire result is not too favorable. If the defendants have a legal right to make this arrangement we must, in passing upon it, consider it as a whole, and not select a particular item of traffic in inquiring whether the price paid for the service is too high.

Several things conclusively show that the trouble of the complainant springs from its location without the free lighterage limits, and not from the circumstance that the Jay Street Terminal is operated by Arbuckle Brothers.

Counsel for the complainant deliberately stated upon the argument that his client would be in no respect benefited if the operation of that terminal were to pass into the hands of a third party or were to be taken over by the defendants themselves. If, then, the complainant is not damaged by the arrangement as it exists, why should we interfere with that arrangement which appears to be for the common benefit of the public and of the railways?

The situation of the American Sugar Refining Company is equally in point. Most of the raw sugar which is refined is received or may be received by water, and much of the product may be sent out by water. A sugar refinery is almost of necessity accessible to extensive dockage facilities, and this is true in case of the American Company.

These docks were owned and operated by Havemeyer, the 115 president of that company, and the complainant made the same claim upon the hearing with respect to the Sugar Trust that it made with respect to Arbuckle Brothers, upon the theory that Havemeyer was the principal owner of the American Sugar Refining Company. It turned out in evidence that the stock holdings of

Mr. Havemeyer in that company were insignificant, and his connection with the company has since been entirely severed, so that, to-day, there is no community of ownership between the person operating the terminal through which its sugar is handled and the refining company itself.

It was practically conceded by the complainant, and is perfectly evident without any concession, that the American Sugar Refining Company enjoys under the present arrangement precisely the same advantage over the complainant as do Arbuckle Brothers, and it is further evident that both companies would enjoy this advantage were Arbuckle Brothers compelled to retire from the operation of the Jay Street Terminal.

It may be suggested in this connection that the Sugar Trust would not be likely to sit idly by if the arrangement at the Jay Street Terminal worked a discrimination against it in favor of its most active rival.

Since the promulgation of the opinion of the commission in the original case a new feature has been introduced into this situation, to which, perhaps, some reference should be made.

Originally the complainant lightered its sugar from its factory at Yonkers to the rail termini of the defendants at Jersey City by the steamer "Ben Franklin." The various packages were marked by the complainant and put on board the steamer at Yonkers. The skipper was provided with bills of lading or receipts for signature by the various railroads over which the shipments were to 116 pass, and he transported these packages from Yonkers to Jersey City, made delivery to the various railroads, and obtained his receipts, which were returned to the complainant.

At the present time the packages are marked and loaded upon the "Ben Franklin" at Yonkers, precisely as before; but the cargo is now consigned to the complainant at Pier 24, which is on the New York side of the Hudson River and within the lighterage limits. The steamer proceeds to Pier 24 and ties up, whereupon a representative of the complainant steps on board, gives the captain of the "Ben Franklin" a receipt for his cargo, and delivers to him the blank receipts or bills of lading which were formerly put into his possession at Yonkers. After this has been done the steamer proceeds to Jersey City and makes delivery to the various rail lines.

It is claimed by the complainant, and apparently found by the commission, that this amounts to a transportation of this sugar from Pier 24 to Jersey City.

The transaction, in fact, is precisely the same now that it was formerly, except that the steamer now stops at Pier 24. Great stress is laid in the opinion upon the fact that the "Ben Franklin" is actually made fast to the wharf, but to my own mind it would subserve exactly the same purpose if she were to whistle in midstream when passing that pier. It is impossible for me to understand how any performance of this character can change the actual relation of these parties when the thing accomplished is in both cases identical.

If the complainant saw fit to put its sugar onto Pier 24 and to notify the defendant to come there and receive it, a different question might be presented. Their traffic would then be within the 117 free lighterage limits, and it is impossible that, having selected decks adjacent to the refineries of the competitors of this complainant, the defendants could not refuse to take the sugar upon this dock.

In order to avoid all misapprehension, let me repeat that we ought not, in my opinion, to sanction the arrangement for the operation of the Jay Street Terminal, if that results in discrimination against this complainant. It is evident that this situation might take various forms, where it could be forcibly urged that such discrimination existed. If, for example, the refinery of this complainant had been located within the lighterage limits, and these defendants by selecting for their terminals in Brooklyn docks adjacent to the refineries of its two competitors had compelled this complainant as a practical matter to lighter its product to the Jersey shore, either because that could be done more cheaply than to deliver it at the Brooklyn terminals or because those terminals were operated by its competitors, who, by handling the traffic of the complainant, would acquire an improper knowledge of its business, serious questions would be presented; but there is nothing of the kind in this case. The only disadvantage here which has been pointed out or which can be pointed out arises from the location of the complainant without the lighterage limits. That was its complaint in the original case, and that is the gravamen of its complaint here. Since the commission has decided that the free lighterage limits of New York ought not to be extended so as to include Yonkers, and since it appears that the arrangement at the Jay Street Terminal is in the general public interest, I do not think this commission should make any order which will prevent these defendants from continuing that arrangement.

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ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of December, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

FEDERAL SUGAR REFINING COMPANY

v.

THE BALTIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE DELAWARE LACKAWANNA & WESTERN RAILROAD COMPANY; THE ERIE RAILROAD COMPANY; THE LEHIGH VALLEY RAILROAD COMPANY; THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; and THE PENNSYLVANIA RAILROAD COMPANY.

No. 2888.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report

containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above-named defendants to Arbuckle Brothers on their sugar brought 119 by them on floats from lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complainants and unduly prefer said Arbuckle Brothers, in violation of the act to regulate commerce:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled "Report and order of the commission" are true copies of the originals now on file in the office of this commission.

In testimony whereof, I have hereunto subscribed by name, and affixed the seal of the commission, this 6th day of March, 1911.

[SEAL.]

A. MOSELEY, Secretary.

120 *Intervening petition of Federal Sugar Refining Company.*

Filed April 19, 1911.

In the Commerce Court of the United States.

BALTIMORE & OHIO RAILROAD COMPANY; CENTRAL RAILROAD COMPANY OF NEW JERSEY; }
DELAWARE, LACKAWANNA & WESTERN RAIL- }
ROAD COMPANY; ERIE RAILROAD COMPANY; }
LEHIGH VALLEY RAILROAD COMPANY; NEW }
YORK, ONTARIO & WESTERN RAILWAY COM- }
PANY, and PENNSYLVANIA RAILROAD COM- }
PANY, petitioners,

vs.

UNITED STATES, RESPONDENT.

PETITION OF FEDERAL SUGAR REFINING COMPANY TO BE MADE A PARTY DEFENDANT.

To the honorable the judges of the Commerce Court of the United States:

The petition of the Federal Sugar Refining Company respectfully shows to this court as follows:

First. That petitioner is a corporation organized and existing under the laws of the State of New York, having its principal office at No. 138 Front Street, New York City.

} Term 1911, No. 38,

68 UNITED STATES VS. BALTIMORE & OHIO RAILROAD CO.

Second. That the above entitled suit involves the validity of an order heretofore made by the Interstate Commerce Commission in a proceeding wherein this petitioner was the complainant and the above-named petitioners were the defendants, and the interest of the petitioner therein.

Third. That petitioner desires to appear in and be made a party defendant to the case and to be represented before the courts by its proper counsel.

Wherefore, your petitioner respectfully prays that it be made a party defendant to the case and that leave be granted to it to appear and be represented therein by its proper counsel.

ERNEST A. BIGELOW,
Solicitor for Petitioner,
15 William Street, New York, N. Y.

Dated New York, April 17th, 1911.

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SOUTHERN DISTRICT OF NEW YORK,

County of New York, ss:

C. A. Spreckels, being duly sworn, deposes and says that he is the president of Federal Sugar Refining Company, a corporation organized under the laws of the State of New York and the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the statements therein contained are true according to the best of his knowledge and belief.

C. A. SPRECKELS.

Subscribed and sworn to before me this 18th day of April, 1911.
[SEAL.]

GEO. H. MITCHELL.

Notary Public, Westchester County.

Certificate filed in New York County.

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Order allowing Federal Sugar Refining Company to intervene.

Entered April 19, 1911.

In the Commerce Court of the United States.

BALTIMORE & OHIO RAILROAD COMPANY; CENTRAL RAILROAD COMPANY OF NEW JERSEY; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; ERIE RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY, and PENNSYLVANIA RAILROAD COMPANY, petitioners.

No. 38.

vs.
UNITED STATES, RESPONDENT.

In the matter of the petition of Federal Sugar Refining Company.

Now, on this 19th day of April, 1911, this cause came on to be heard on the petition of Federal Sugar Refining Company to be

made a party defendant in this suit and for other relief, said petition being verified the 18th day of April, 1911;

Whereupon, after reading said petition, and due deliberation being had thereon, on motion of Ernest A. Bigelow, solicitor for said Federal Sugar Refining Company, it is hereby—

Ordered, that the petitioner, Federal Sugar Refining Company, be and it hereby is made a party defendant in this suit, with leave to appear and be represented therein by its proper counsel.

Allowed per curiam.

KNAPP, P. J.

123 *Intervening petition of Brooklyn Eastern District Terminal and notice.*

Filed May 11, 1911.

In the Commerce Court of the United States,

THE BALTIMORE AND OHIO RAILROAD
Company; the Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and the Pennsylvania Railroad Company, petitioners,

against

UNITED STATES, RESPONDENT.

May session, 1911. No. 38.

Notice is hereby given that a petition by the Brooklyn Eastern District Terminal, of which the annexed is a copy, for leave to intervene as one of the complainants in this suit, has been filed with the court; and that at a session of the court to be held in the city of

124 Washington, D. C., on the 17th day of May, 1911, at the opening of court on that day, or as soon thereafter as counsel can

be heard, application will be made to the court for the relief in said petition prayed, and for such other and further relief as may be just.

Dated New York, May 10th, 1911.

PARSONS, CLOSSON & McILVAINE,
Solicitors for Brooklyn Eastern District Terminal,
Petitioner, 52 William Street, New York City, N. Y.

To the honorable ATTORNEY GENERAL OF THE UNITED STATES and all other parties of record or in interest.

THE BALTIMORE AND OHIO RAILROAD COMPANY; the Central Railroad Company of New Jersey; the Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; and the Pennsylvania Railroad Company, petitioners,

Term, 1911. No. 38.

against

UNITED STATES, RESPONDENT.

To the judges of the Commerce Court of the United States:

The Brooklyn Eastern District Terminal, a corporation of the State of New York, brings this its petition for leave to intervene as one of the complainants in this suit; and thereupon your petitioner respectfully shows unto your honors as follows:

1. Your petitioner is a transportation corporation organized under the laws of the State of New York, engaged as a common carrier in the transportation of property partly by railroad and partly by water, the transportation by water being performed by your petitioner under arrangements, hereinafter stated in detail, with the railroads who are complainants in this suit, for a continuous carriage or shipment, from one State to another.

2. This is a suit instituted in this court on or about the 11th day of April, 1911, by the seven complainants herein, who are railroads, commonly known as "trunk lines," engaged in the transportation of passengers and property between the city of New York and the Western States and the intermediate territory, to set aside and suspend an order of the Interstate Commerce Commission made on the 5th day of December, 1910, in a proceeding before it, wherein the Federal Sugar Refining Company of Yonkers was complainant, and the complainants herein were defendants, requiring the complainants herein to resist and abstain from paying to Arbuckle Brothers (operating what is known as the Jay Street Terminal) certain so-called allowances for floatage, lighterage, and terminal service rendered by them to the complainants in connection with sugar transported by them in New York Harbor to and for the complainants, while at the same time paying no such allowances to the said Federal Sugar Refining Company on its sugar. Application has been made to this court by the complainants herein that a temporary injunction issue suspending the said order and any and all proceedings thereunder pending a final determination of the suit; and, as your petitioner is informed and believes, the said application is to be heard by this court on the 17th day of May, 1911.

3. Your petitioner was a party in interest, though not of record, to the proceedings before the Interstate Commerce Commission in which the said order was made; and there is involved in this suit 127 the validity of such order and the interest of your petitioner; and your petitioner is a corporation interested in the said controversy before the Interstate Commerce Commission and in this suit, brought by the complainants, under the terms of the act to regulate commerce, relating to the said action of the Interstate Commerce Commission.

4. Your petitioner is the Brooklyn Eastern District Terminal, which is mentioned in the original petition of the Federal Sugar Refining Company to the commission, annexed to the petition of the complainants herein as Exhibit B, and in the answer thereto of the defendants, annexed to said petition as Exhibit C, and in the report of the commission and in the separate opinions of certain of the commissioners, thereto appended, upon said original petition (likewise annexed to the complainants' petition herein as Exhibit D), and in the report of the commission and in the separate opinions of certain of the commissioners, thereto appended, upon the petition which resulted in the order now sought to be set aside (likewise annexed to the complainants' petition herein as Exhibit G). In such last-named report your petitioner is referred to in the following passage thereof (p. 106):

"The complainant [the Federal Sugar Refining Company] also charges that a similar allowance paid to the owners of the so-called Brooklyn Eastern District Terminal, owned by Havemeyer interests, also subjects it to undue prejudice and disadvantage. It is at this dock that the output of the American Sugar Refining Company is largely handled. But although our understanding had been to the contrary, we were told at the hearing that the Havemeyers owned only an insignificant amount of the capital stock of that company. Accepting these statements at their face value, we need 128 not at this time consider that phase of the complaint."

5. All of the capital stock of your petitioner is owned by the partnership of Havemeyers & Elder, composed of the following persons, to wit, Louisine W. Havemeyer, Horace Havemeyer, Theodore A. Havemeyer, Henry O. Havemeyer, jr., and Frederick C. Havemeyer, jr. Neither the said partnership, nor any of its members, owns or has any interest, direct or indirect, in the American Sugar Refining Company, referred to in the said report of the commission, or in its stock, or any connection therewith, nor has had since the 1st day of January, 1911.

6. For years past your petitioner, as lessee of the said firm of Havemeyers & Elder, has maintained and operated in the Borough of Brooklyn, New York, along the East River, between North Third and North Tenth Streets, an extensive railroad terminal, which has been designated in the tariffs of the complainants' railroads herein, except the Pennsylvania Railroad, and is used by it and three other railroads and eighteen steamship lines engaged in the transporta-

tion of freight to and from New York Harbor as a receiving and delivery station for their freight. Its equipment is correctly described in the existing tariff of the complainant the Central Railroad of New Jersey (I. C. C. S., No. 2230) as follows:

"Brooklyn Eastern District Terminal (formerly Palmer's Dock).

"At this station, which faces on the East River and extends from North Fourth Street to North Tenth Street, Brooklyn, N. Y., freight of all descriptions in any quantity, both package and bulk, can be handled, except acids, in carboys, less than carleads; petroleum oils, in tank cars, powder, high explosives, ice, in any quantity; 129 'to be graded grain' and twelve-wheel railroad cars on their own wheels.

There are trackage facilities, where cars can be handled to and from floats and contents forwarded or delivered from track; lumber, brick, etc., in full carloads, or heavy packages or pieces sufficient to warrant straight cars, may be accepted for and ticketed direct to this station. This station has also covered pier where package freight is handled directly between the cars and pier. The terminals at Brooklyn Eastern District Terminal are centrally located and easy of access, and are equipped with modern appliances for the convenient and prompt handling of freight of all kinds. The yards for the delivery of track freight have paved roadways without grade, and a capacity for several hundred cars. There is also a yard for the accommodation of livestock, grain elevators of 500,000 bushels capacity, a hay warehouse in which hay can be inspected, sold, or stored; one crane of 20 tons capacity, and 2 cranes of 10 tons capacity each, and other special facilities for the handling of heavy freight, such as machinery, structural material, &c."

The present value, as nearly as can be estimated, of the plant and equipment of your petitioner's Brooklyn Terminal alone is as follows:

Real estate	\$5,288,360.00
Building and construction	435,809.53
4 tugs	137,146.79
13 floats	258,987.98
13 lighters	79,377.72
9 locomotives	49,679.44
Franchises	14,000.00
	\$6,263,401.59

130 Upon this investment of \$6,263,401.59 the net earnings of your petitioner during the year 1910 were \$321,555.12, or 5.13 per cent. All of these earnings (except an amount not to exceed 5.02% thereof, from other sources, such as storage, drayage, etc.) were derived from the payments made to it by the complainants and other connecting carriers besides charges for dunnage, car service, and shifting, of $\frac{1}{2}$ cents or 3 cents for each 100 pounds of freight transported by it between its terminal and the termini of such railroads and steamship lines in New York Harbor; the said sum of $\frac{1}{2}$ cents being paid it on all freight moving to or from the western termini of the trunk lines and points beyond, except grain in bulk,

coal, and coke, and the said sum of 3 cents per 100 pounds on all other freight except coal and coke. During the year 1910 the total freight transported by it to or from the said Brooklyn Terminal and smaller terminal stations likewise maintained by it at Pidgeon Street in Long Island City and at Warren Street in Jersey City, was 2,796,263,006 pounds. Of this total, \$68,022,125 pounds, to wit, 31.01 per cent, was sugar, and 1,928,240,811 pounds, to wit, 68.96 per cent, was miscellaneous merchandise. Of this total tonnage transported by your petitioner, 53.74 per cent was eastbound, and 46.26 per cent westbound. It was received from or delivered to not less than 1,650 separate customers. The maintenance and operation of the terminal is a commercial necessity for the large and busy districts of Brooklyn and Jersey City which it serves; and is rendered possible only by the fact that as a union terminal for all the said railroads and steamship lines it is able to amalgamate their eastbound and westbound business, so that it handles each way approximately the same amount of traffic as above stated; and is thus enabled to earn the very moderate return of 5.13 per cent upon its investment 131 as above stated; a result which could not be accomplished by any terminal handling the traffic of one railroad or steamship line alone.

7. The transportation business of your petitioner, as above outlined, is secured to it not alone by its ability to perform the service, but, in the case of most of the trunk lines, by contracts between it and them having yet several years to run, substantially in the form of that between your petitioner and the complainant Erie Railroad Company, a copy of which is annexed hereto, marked "Exhibit A." In and by said contract your petitioner agrees to maintain its terminal and the necessary floats, tugs, docks, float bridges, and approaches; at all times to receive, transfer, and deliver freights loaded or to be loaded in cars sufficient to accommodate the amount of business to be interchanged by it with the railroad; to be absolutely and unqualifiedly responsible for the safety of all cars and freight while in its possession; to provide a competent person to superintend the traffic of the railroad, and to issue bills of lading for it upon its account for west-bound freights received for it by your petitioner at its terminal; to be responsible for and pay to the railroad company all freight moneys and charges for the transportation of east-bound freights, and all freight moneys and charges payable in advance on west-bound freights, and to keep insured all freights, cars, or property received by it under the contract. In consideration thereof, the railroad company upon its part by the eleventh article of the contract agrees that within the limits of the former city of Williamsburg, extending from Wallabout Bay, on the south, to Newtown Creek, on the north, not inclusive of either, the railroad, unless legally compelled to do so, will not during the continuance of the contract establish or maintain any freight stations, nor within 132 said limits receive on barges, lighters, floats, or other water craft, for transportation over the lines of its railroad to west-

ern points therein mentioned, any freights, except as provided for in the said contract; and that it will not deliver on barges, lighters, floats, or other water craft at any points within such limits, unless legally compelled to do so, any freight received or transported eastwardly over its railroad in any other manner than as provided for in such contract. And by the fourteenth article thereof the railroad further agrees to pay to your petitioner in full for all its services under this contract, as well as full compensation for all responsibility to be undertaken by it in respect to cars and freight, as follows:

"(a) For all freight, except coal and coke, transported over the Erie Railroad which shall have been received from its connecting rail or water line west of the western termini of the trunk lines, on through rates, or for freight received by the Terminal Company at its aforesaid premises and destined for rail or water transportation by the railroad company to points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth (4 $\frac{1}{5}$) cents per hundred pounds.

(b) For freight originating at or destined to any of said western termini or points east thereof, or billed to or from said western termini at local rates, three (3) cents per hundred pounds.

(c) For grain in bulk the rate shall be three (3) cents per hundred pounds."

8. The contracts between the different trunk lines, complainants herein, and the Jay Street Terminal (operated by Arbuckle Brothers) (annexed to complainants' petition as Exhibit A) are substantially similar to the existing contracts above averred between the said trunk lines and your petitioner. For the reasons hereinafter averred, neither the said Jay Street Terminal nor the terminals of your petitioner can be maintained or operated unless the payment of the stipulated compensation of 3 and 4 $\frac{1}{5}$ cents per 100 pounds for the floatage, lighterage, and terminal service rendered thereunder shall continue to be made to them by the railroads.

9. The order of the Interstate Commerce Commission, which the complainant railroads must necessarily obey, unless it be set aside in this suit, requires them to desist from paying such compensation to the Jay Street Terminal in regard to sugar received through it from Arbuckle Brothers, unless they shall at the same time pay the same compensation in regard to sugar received from it to the Federal Sugar Refining Company, which is not a common carrier, and does not own or operate a terminal station for any of the railroads or steamship lines, or for any other shipper or consignee of freight, but is simply a shipper of its own product. If this order should go into force its necessary effect, the only alternative provided being the discontinuance of a terminal the continued maintenance of which is necessary for public convenience and has been contracted for between its owners and the railroads, would be to compel the payment by the railroads to the Federal Sugar Refining Company of the same sums

of 4½ cents and 3 cents per 100 pounds of freight transported, as is now paid by them to the Jay Street Terminal and to your petitioner for the floatage, lighterage, and terminal service afforded by them, respectively.

10. The actual cost to the Federal Sugar Refining Company 134 of transporting its sugar from its refinery to the termini of the railroads, as it maintains no terminal station, tracks, floats, lighters, tugs, or other real estate or equipment necessarily appertaining to a terminal, but procures the transportation to be performed for it by a lighterage company at what is the prevailing rate in the harbor of New York for lighterage alone, to wit, 3 cents per 100 pounds, is and will be such 3 cents per 100 pounds and no more; whereas under the terms of such order it will receive from the railroads on all sugar bound for points beyond the western termini 4½ cents per 100 pounds. On all such sugar it will accordingly earn a profit, and in effect receive a rebate from the railroads, of 1½ cents per 100 pounds, thus making the freight rate actually paid upon such sugar produced by it 1½ cents per 100 pounds less than the published rates, and giving it that advantage over other competing sugar refineries located in the harbor of New York, among others, the American Sugar Refining Company, a large part of whose traffic is now, owing to the contiguity of its refineries to the terminal of your petitioner, handled by your petitioner.

11. In order to avoid the illegal discrimination which would thereby issue to the Federal Sugar Refining Company if such order shall go into effect, the railroads will of necessity be compelled to permit the other sugar refineries in the harbor of New York, among others, the said American Sugar Refining Company, instead of delivering their outgoing sugar to the different terminal stations, your petitioner's among the number, which are now maintained by the railroads in convenient proximity to the refineries, and at which such sugar is now loaded directly into the through cars upon which

it is to be transported to destination, to deliver it at the railroad 135 termini, there to be unloaded and again loaded into such cars, by lighters hired by the refineries themselves at a cost to them of 3 cents per hundred pounds only; and to receive from the railroads upon all such sugar destined for points beyond the western termini 4½ cents per hundred pounds; and in this manner to enable all of the said refineries, as well as the Federal Sugar Refining Company, though maintaining no terminal stations, to earn the same profit and receive the same rebate on such sugar of 1½ cents per hundred pounds, and to make the freight rate payable upon such sugar less than the published rate by that amount.

12. Such diversion of traffic from the now established terminal stations of the railroads not only involves two unnecessary handlings of the merchandise so transported and a congestion of traffic at the termini of the different railroads, but a loss to each such terminal station, your petitioners among the number, of their present revenue of 3 and 4½ cents per hundred pounds upon the traffic so diverted.

Without such revenue it will not be possible for any of such terminals to earn a reasonable return upon the investment involved in it, or to continue to maintain and operate it. The discontinuance of such terminal stations would necessarily involve great inconvenience and loss, not only to the railroads for whom freight is now received and delivered there, without transshipment to and from the through cars in which it is transported, but to the numerous neighboring shippers and consignees who now use such terminals for the receipt and delivery of their freight, and who, not having and not being able to procure water front facilities such as are possessed by the few large refineries and other industries now on the water front, will be unable to avail themselves of the privilege of lightering their 136 own freight at a profit at the expense of the railroads, which the order of the commission complained of in effect secures to such water front industries alone.

13. The compensation of 4½ cents per 100 pounds on western traffic now paid by the railroads to the terminals is a reasonable and necessary compensation for the service performed by them. Such terminals are in effect union receiving and delivery yards, located at convenient points along the water front of New York Harbor, of the railroads for whose benefit they are maintained. They are necessarily union terminals, since individual terminals for the different railroads cannot be profitably maintained or operated. They are necessary, since they afford a means whereby the freight shipped from or consigned to the district served by the terminal can be assembled at and delivered from a point conveniently near its origin or destination, and there loaded into or unloaded from the through cars in which its continuous carriage has been or is to be performed without transshipment or breaking bulk. If such terminal stations were not maintained by the Terminal Companies from the compensation paid to them by the railroads for the services performed by them, they would need to be maintained at the direct expense of the railroads themselves, and less economically than now; since it is only as union terminals, serving all the different railroads and steamship lines entering the harbor, that they can be made to earn a reasonable profit upon the capital necessarily invested in them. Each such terminal involves the devotion to its use of large areas of expensive real estate and the maintenance of the extensive equipment heretofore described, including locomotives, and tugs, and floats, each capable of receiving from the tracks from twelve to twenty 137 loaded freight cars, transporting them across the harbor, and thence delivering them upon the tracks of the terminal or of the railroads by which they are to be moved to destination. It appears from Exhibit G, attached to the complainant's petition hereto, that the capital necessarily invested in the Jay Street Terminal amounts to \$1,200,000, and that its net earnings for one year were but \$35,566.81, or approximately three per cent. As heretofore averred, the capital necessarily invested in its Brooklyn Terminal alone by your petitioner amounts to \$6,263,401.59, and its net earn-

ings therefrom for one year were but \$321,555.12, or approximately \$5.13 per cent. Even such moderate returns upon the capital invested are made possible only by the compensation received from the railroads of 4½ cents per 100 pounds on the western traffic; and for the service performed by such terminals, such compensation of 4½ cents per 100 pounds is reasonable and necessary. On the other hand, lighterage service alone, as distinguished from a terminal and car floatage service, is performed by small lighters, representing each an investment of not more than \$7,000, a fleet of from two to four of which can be towed by a tug hired for the purpose at an expense of \$7.50 per hour. For such simple lighterage service, when not performed in connection with the maintenance of a terminal, the compensation of 3 cents per 100 pounds is adequate.

14. As your petitioner is advised and believes and therefore alleges, the order of the Interstate Commerce Commission sought to be set aside in this suit is illegal for the following reasons, among others:

(a) The maintenance by the railroads of public receiving and delivery stations to which cars are transported on their own wheels,

such as the Jay Street Terminal and that of your petitioner's,
138 located at points on Long Island convenient to the origin and destination of the freight to be carried, and the payment of the compensation necessary to procure the maintenance of such stations and the transportation of such cars to and from them, is a lawful and necessary service performed by the railroads. The Interstate Commerce Commission has not the power to require the railroads, as a condition of being permitted to maintain and operate such terminals, to pay lighterage allowances to individual shippers who elect instead to deliver their own freight to the railroad termini in New Jersey and on Staten Island. By the order in question the commission has assumed to exercise such power.

(b) The maintenance of such public terminals for handling cars on their own wheels is not a like service to lighterage the freight of individual shippers from their private docks to the railroad termini; and the railroads may pay to such terminals the expense of the public service and refuse to pay to such shippers the expense of the private service without thereby being guilty of any discrimination. The order in question of the commission is based upon the preposition that the railroads in so doing are guilty of unjust discrimination.

(c) The railroads may under the law maintain public receiving and delivery stations, such as the Jay Street Terminal and that of your petitioner, at convenient points without thereby incurring any obligation to pay shippers located at points remote from such stations the expense of the cartage or lighterage of their merchandise from their factories to any of such stations or to another station. The order of the commission imposes upon the railroads such obligation as a condition of being allowed to maintain such public stations.

139 (d) The railroads, having established through routes and joint rates to their several stations on Long Island, your petitioner's among the number, cannot be required under the law to pay to individual shippers on Long Island who elect to deliver their freight instead at an intermediate point in such through route, the cost to such shippers of such delivery to such intermediate point. Under the order of the commission the railroads will be required to make such payments.

(e) The just and reasonable charge and allowance for the sole service of lightering sugar, when the expense of maintaining a public terminal station is not involved in the service, from the refineries in New York Harbor, and from the Federal Sugar Refining Company in Yonkers, to the railroad termini in New Jersey and Staten Island, and the actual cost to the refineries of such lightering is three cents per 100 pounds. The order of the commission requires the railroads to pay to such refineries on all sugars so lightered bound for points beyond the western termini, 4 1-5 cents per 100 pounds, to wit, a rebate of 1 1-5 cents per 100 pounds on all such sugar.

Wherefore your petitioner prays that it may be allowed to intervene as a complainant herein and to prosecute this suit, and that a final decree may be entered herein setting aside and annulling said order of the Interstate Commerce Commission, dated the 5th day of December, 1910, and further that a temporary injunction may issue herein suspending said order and any and all proceedings thereunder pending a final determination of this proceeding.

And your petitioner will ever pray,

Dated, New York, May 9th, 1911.

PARSONS, CLOSSON & MCILNAINE,

Solicitors for Brooklyn Eastern

District Terminal, Petitioner,

52 William Street, New York, N. Y.

140 STATE OF NEW YORK,

County of New York, etc.

Henry O. Havemeyer, jr., being duly sworn, deposes and says: That he is the president and general manager of the Brooklyn Eastern District Terminal, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof; and that the statements contained therein are true, according to the best of his knowledge and belief.

HENRY O. HAVEMEYER, JR.

Sworn to and subscribed before me this 10th day of May, 1911.

[SEAL.]

ANDREW WOELFEL,

Notary Public, Richmond County,

Cert. filed in N. Y. Co.

EXHIBIT A.

This agreement, made this sixth day of May, A. D. one thousand nine hundred and seven, between the Brooklyn Eastern District

Terminal, of the city of New York (hereinafter called the "Terminal Company"), party of the first part, and the Erie Railroad Company (hereinafter called the "Railroad Company"), party of the second part:

Whereas the Terminal Company is the lessee of certain premises situated in the city of New York, Borough of Brooklyn, eastern district, fronting on the East River between North Fifth and North Sixth Streets, and extending back to within one hundred and fifty (150) feet of Berry Street, upon which are warehouses, main tracks and sidings, float bridges and approaches, with other appurtenances suitable for the reception and delivery of freights, sugars, cooperage materials, etc., for carriage between said premises and the freight station of the Railroad Company at present located at Jersey City; and

Whereas the Terminal Company is also the lessee of certain premises situated in the said borough of Brooklyn, eastern district, fronting on the East River between North Ninth and North Tenth Streets, on which are bay warehouses, grain elevators, warehouses, main tracks and sidings, float bridges and appurtenances suitable for the reception and delivery of freight as contemplated under this contract; and

Whereas the railroad of the Railroad Company runs to its said freight station at Jersey City, and the Railroad Company desires to avail itself of the facilities of the Terminal Company for the purpose of transferring its freight in both directions between said premises in Brooklyn and the freight station aforesaid:

Now this agreement witnesseth:

First. The Terminal Company will put and maintain in good order the premises aforesaid in the Borough of Brooklyn for the reception and delivery of freights hereunder, and will provide and maintain floats, tugs, docks, float bridges, and approaches adequate at all times to receive, transfer and deliver freights loaded or to be loaded in cars under this contract, and sufficient to accommodate the amount of business hereunder contemplated.

Second. The Terminal Company will receive at Jersey City float bridges of the Railroad Company in cars placed on its floats all

freight intended for delivery at its premises aforesaid and will safely carry and deliver same as consigned, and as well

will receive at its said premises and load into cars, under the rules of the Railroad Company, and safely carry and deliver the freights loaded upon its floats to the Railroad Company at Jersey City float bridges.

Third. The responsibility of the Terminal Company for eastwardly bound cars and property therein shall begin when the same are properly loaded and secured upon its floats at said Jersey City float bridges of the Railroad Company and the floats released from said bridges, and shall continue in respect to cars until they have been returned by it loaded or empty, and in respect to the property

contained in eastwardly bound cars, its responsibility shall continue until its actual delivery and acceptance by consignee at Brooklyn.

Fourth. The responsibility of the Terminal Company of all property to be transported westbound shall begin from the time the same is received from the consignor, or consignors, thereof, at its premises aforesaid, and shall continue until the same, loaded into cars, shall have been brought to the float bridges of the Railroad Company at Jersey City in readiness to be attached thereto.

Fifth. The said responsibility of the Terminal Company for the safety of all cars and freight shall be absolute and unqualified, without any exception or exemption whatever, without regard to the cause or occasion of the loss or damage, if any, and without regard to the degree of care or want of care exercised by the Terminal Company, and shall be enforceable by the Railroad Company, or others, as their interest shall appear, for the full amount of the loss or damage sustained.

143 Sixth. The Terminal Company will provide and keep at its own expense upon its said premises, a competent person to be satisfactory to the Railroad Company, to superintend the business hereunder contemplated and to carry out the directions of the Railroad Company as to loading cars, such person to have authority, subject to current instructions from the Railroad Company, to issue bills of lading of the Railroad Company for westbound freights received upon said premises for transportation under this contract, provided, however, that the Terminal Company hereby assumes all risk of and becomes responsible, as hereinbefore provided, to the Railroad Company or others, as interest may appear, for all westbound freight so received, until the same shall have been loaded into cars and delivered at the float bridges of the Railroad Company at Jersey City aforesaid.

Seventh. The Terminal Company will become responsible for and pay to the Railroad Company all freight moneys and charges as set forth in the freight bills rendered by the Railroad Company for the transportation of eastbound freights, and in like manner will be responsible for and pay to the Railroad Company all freight moneys and charges which may have been made payable in advance on westbound freights, all of which payments shall be turned over to the Railroad Company in accordance with the latter's customary rules; and, if so required, a bond with surety satisfactory to the Railroad Company shall be furnished by the Terminal Company.

Eighth. The Terminal Company will insure and keep insured against loss or damage by fire and marine risks all freights, cars, or property received by it upon its floats or upon said premises

144 under this contract, so long as said freights, cars, or property shall remain in its possession and until delivered to consignee or to the Railroad Company for transportation as hereinbefore provided, including the time such freight, cars or property shall be upon its lighterage line, and such insurance shall be for the benefit of the Railroad Company and others as their interest shall appear, and to

an amount and in such manner as will be satisfactory to the Railroad Company.

Ninth. In cases of eastbound freight consigned to other stations of the Railroad Company in New York Harbor not billed "lighterage free" where destination is changed to the premises of the Terminal Company, the Terminal Company shall at the request of the Railroad Company collect from the consignee or forwarder the sum of three cents per hundred pounds, and pay the same over to the Railroad Company, which said three cents per hundred pounds shall be allowed and paid to the Terminal Company as full compensation for all services performed in such cases.

Tenth. Said Terminal Company will furnish said Railroad Company with a complete and accurate copy of each and all contracts made by it with other railroad companies during the term of this contract, and the Erie Railroad Company shall have and enjoy, during the life of this contract, all rights and privileges granted to any other railroad by said Terminal Company upon as favorable terms, with respect to allowances or otherwise, as granted to any other railroad company, anything herein to the contrary notwithstanding.

Eleventh. It is further understood and agreed that within the limits of the city of Williamsburgh, so-called, extending from

145 Wallabout Bay on the south to Newtown Creek on the north, not inclusive of either, the said Railroad Company, unless

legally compelled to do so, will not, during the continuance of this contract, establish or maintain any freight stations nor within said limits receive on barges, lighters, floats or other water craft, for transportation over the line of its railroad to western points herein-after mentioned, any freights except as provided for in this contract, and that it will not deliver on barges, lighters, floats or other water craft at any points within the limits hereinbefore described, unless legally compelled to do so, any freight received or transported eastwardly over the railroad of the Railroad Company in any other manner than as provided for in this contract, and that in case of any breach of this provision the Terminal Company may recover from the said Railroad Company, and it shall pay to it at the rate of three (3) dollars for each carload, averaged at 20,000 lbs., received, delivered or transported contrary to this provision, except that in the event of the disability of the Terminal Company through strikes, lock-outs, fire, etc., not being able to handle the traffic of the Railroad Company promptly as offered, the Railroad Company shall have the privilege of making delivery of freight by barge or float within the limits above named during such disability of the Terminal Company.

Twelfth. The Railroad Company will maintain all necessary tracks, float bridges and approaches at its said Jersey City station for the purpose of the business hereunder contemplated, and will take away from said float bridges in Jersey City in regular turn all the westbound freight intended for transportation over the railroad of the Railroad Company and its connections, and deliver to

146 the floats of the Terminal Company all the eastbound freight

consigned to or intended for delivery at the terminal of the Terminal Company.

Thirteenth. The Railroad Company hereby agrees to provide sufficient cars at all times, unavoidable delays excepted, and to supply all railroad books, blanks, and stationery necessary for the purposes of the business to be carried on under this contract, and with all reasonable despatch to receive and take away from the freight station at Jersey City aforesaid all the westbound freight intended for transportation over said Erie Railroad and its connections.

Fourteenth. The Railroad Company shall pay the Terminal Company in full for all its services under this contract, as well as full compensation for all responsibility to be undertaken by it in respect to cars and freight as follows:

(a) For all freight, except coal and coke, transported over the Erie Railroad which shall have been received from its connecting rail or water line west of the western termini of the trunk lines, on through rates, or for freight received by the Terminal Company at its aforesaid premises and destined for rail or water transportation by the Railroad Company to points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth (4 1-5) cents per hundred pounds.

(b) For freight originating at or destined to any of said western termini or points east thereof, or billed to or from said western termini at local rates, three (3) cents per hundred pounds.

(c) For grain in bulk the rate shall be three (3) cents per hundred pounds, it being understood that no grain will be handled under this agreement except that intended for domestic consumption.

147 (d) It is understood that the western termini referred to above are as follows: Suspension Bridge, Black Rock, Buffalo Junction, Erie, Belleaire, Niagara Falls, Buffalo, Dunkirk, Pittsburgh, Wheeling, Tonawanda, East Buffalo, Salamanca, Allegheny, Parkersburg.

(e) For traffic rated per gross ton, either in the official classification or in commodity tariffs, the allowance to the Terminal Company thereon shall be three (3) cents or four and one-fifth (4 1-5) cents per hundred pounds, as the case may be, regardless of the gross ton rating.

(f) If coal and coke are handled under this contract, the terms of and rates for such handling shall be fixed from time to time by special agreement.

(g) All settlements are to be made monthly.

Fifteenth. During the continuance of this contract on eastbound and westbound shipments the same rates of freight shall prevail to and from the premises of the Terminal Company that prevail to and from the regular freight stations of the Railroad Company in New York City.

Sixteenth. This contract shall continue in effect until December 1st, 1916, and thereafter shall terminate by ninety days' notice in

writing given by the Terminal Company, or the Railroad Company, to the other of desire to terminate the same.

Seventeenth. This agreement shall be binding upon and enure to the benefit of the parties hereto and their successors and assigns, respectively.

148 In witness whereof the parties hereto have executed this contract in duplicate the day and year first above written.

BROOKLYN EASTERN DISTRICT TERMINAL,
By H. O. HAVEMEYER, Jr., *President.*

Attest:

J. H. McCAFFERTY, *Secretary.*

ERIE RAILROAD COMPANY,
By F. D. UNDERWOOD, *President.*

Attest:

DAVID BOSMAN, *Secretary.*

149 *Order allowing Brooklyn Eastern District Terminal to intervene.*

Entered May 17, 1911.

In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS,

vs.

No. 38.

THE UNITED STATES, RESPONDENT.

On motion of Brooklyn Eastern District Terminal, a corporation, of the State of New York, by Henry B. Closson, its solicitor, in open court made, notice in that behalf having been duly served, that the said Brooklyn Eastern District Terminal be allowed to intervene and become a party to the above-entitled proceeding, and having duly filed and presented a petition in that behalf—

It is ordered, That the said Brooklyn Eastern District Terminal be, and it hereby is, allowed to intervene in and become a party to the above-entitled cause and to be represented by its counsel.

By the court:

MARTIN A. KNAPP,

Presiding Judge.

150 *Motion of Interstate Commerce Commission and Federal Sugar Refining Company to dismiss.*

Filed May 11, 1911.

In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.,

petitioners,

v.

UNITED STATES, respondent.

In Equity, No. 38.

MOTION TO DISMISS.

Come now the Interstate Commerce Commission and the Federal Sugar Refining Company, parties respondent in the above entitled

suit, by their respective solicitors, and move this honorable court to dismiss the petition of the above named petitioners in said suit, and in support of said motion show:

That the allegations contained and the facts set forth in said petition do not constitute a cause of action or entitle said petitioners to the relief or any of the relief asked for by them in and by said petition.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission.

ERNEST A. BIGELOW,

Solicitor for Federal Sugar Refining Company.

151 *Intervening petition of John Arbuckle and William A. Jamison and notice of motion.*

Filed May 12, 1911.

In the United States Commerce Court.

NOTICE OF MOTION.

THE BALTIMORE AND OHIO RAILROAD
Company; The Central Railroad
Company of New Jersey; The Delaware,
Lackawanna and Western
Railroad; Erie Railroad Company;
Lehigh Valley Railroad Company;
New York, Ontario and Western
Railway Company; and The Pennsylvania
Railroad Company, petitioners,

vs.

UNITED STATES, RESPONDENT; JOHN
Arbuckle and William A. Jamison,
intervenors.

May Session, 1911. No. 38.

Please take notice that upon the petition of John Arbuckle and William A. Jamison, composing the copartnership known as the Jay Street Terminal and composing the copartnership known 152 as Arbuckle Brothers, and upon the proceedings had and testimony taken in a certain proceeding before the Interstate Commerce Commission of the United States upon the complaint of Federal Sugar Refining Company against the Railroad Companies above named, known as Docket No. 2888, and upon the affidavit of William A. Jamison, sworn and subscribed to May 9, 1911, and upon all the papers and proceedings before this court in the proceeding above entitled, we will move this court at a term thereof to be held on the 17th day of May, 1911, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the courtroom of this court in the city of Washington, District of Columbia, for an order

of intervention, making the Jay Street Terminal and Arbuckle Brothers parties to this suit or proceeding and for an order restraining and suspending until the final hearing and determination of this action the order of the Interstate Commerce Commission, dated December 5, 1910, made in the proceeding above referred to, Docket No. 2888, and for such other and further order and relief as may be just and proper.

Dated New York, May 12, 1911.

DYKMAN, OELAND & KUHN,

Solicitors for Jay Street Terminal

and Arbuckle Brothers,

177 Montague Street, Brooklyn, New York.

To the INTERSTATE COMMERCE COMMISSION,

To the Hon. GEORGE W. WICKERSHAM,

Attorney General, United States.

153 In the United States Commerce Court.

PETITION FOR LEAVE TO INTERVENE AND FOR INJUNCTION, ETC.

BALTIMORE & OHIO RAILROAD COMPANY, AND OTHERS,

petitioners,

against

THE UNITED STATES, RESPONDENT; JOHN ARBUCKLE AND

William A. Jamison, intervenors.

To the judges of the Commerce Court of the United States:

The petition of John Arbuckle and William A. Jamison, located and doing business in the city of New York, respectfully shows:

I. The Jay Street Terminal is a copartnership composed of John Arbuckle and William A. Jamison, and its business is to maintain and operate the union freight terminal station of the complainant railroad companies located at the foot of Bridge Street, Brooklyn. The copartners have filed with the clerk of the county of New York, in the State of New York, in accordance with the laws of the State of New York, the certificate necessary to authorize them to do business under the said name.

154 II. Arbuckle Brothers, doing business as refiners of sugar, and dealers in green and roasted coffee, is a copartnership composed of John Arbuckle and William A. Jamison. The copartners have filed with the clerk of the county of New York, in the State of New York, in accordance with the laws of the State of New York, the certificate necessary to authorize them to do business under the said name.

III. Your petitioners are interested in this controversy and in the question before the Interstate Commerce Commission and in this suit and they desire to intervene and be made parties complainant in the proceedings above entitled, commenced in this court by complainants above named against the United States. The petition of the complainants is for a final decree setting aside and annulling an

order of the Interstate Commerce Commission, dated December 5, 1910, by which the complainants above named are required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter, to abstain from paying the Jay Street Terminal for transporting the sugar of Arbuckle Bros. from Brooklyn to the railroads of the complainants in New Jersey, while at the same time paying no such allowances to Federal Sugar Refining Company. Your petitioners are aggrieved by the order referred to and desire to intervene in this action or proceeding.

IV. The Jay Street Terminal owns real estate bordering the East River in the Borough of Brooklyn, at or near the foot of Bridge Street, extending along the East River about 1,200 feet, and 600 feet deep. It has projected piers from this upland into the waters of the East River. Upon the upland it has built freight houses, warehouses, and a railroad yard with railroad tracks reaching and extending to and over a float bridge. It also owns and operates locomotive steam engines, tugboats, steam lighters, barges, and car floats. The value of the real and personal property in use in the business of Jay Street Terminal exceeds \$2,000,000. The real estate is assessed for taxation by the city of New York, for the year 1911, at above \$1,700,000. By the contracts set forth in the next paragraph hereof the Jay Street Terminal has devoted its real and personal property to the public uses served by the complainant railroad companies.

V. The Jay Street Terminal has entered into contracts with the complainant railroad companies substantially identical. A copy of one is attached to the petition of the complainant railroad companies, marked Exhibit "A." The contracts with the Baltimore & Ohio Railroad Company and the Central Railroad Company of New Jersey are oral contracts, and are terminable by either party at any time. The contracts with the New York, Ontario & Western Railroad Company and the Pennsylvania Railroad Company are made by interchange of letters, and are also terminable at any time. The contract with the Delaware, Lackawanna and Western Railroad Company was made April 1, 1910, and terminates March 31, 1915. The contract with the Erie Railroad Company was made February 15, 1906, to terminate March 31, 1910, and continues thereafter until terminated by ninety days' notice in writing by either party to the other.

The contract with the Lehigh Valley Company was made 156 March 15, 1906, to terminate March 31, 1910, and continues thereafter until terminated by ninety days' notice in writing by either party to the other.

VI. The complainant railroad companies transport between the Jay Street Terminal and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the points of destination, and for the flat New York rate by means of floats carrying cars operated for them under the said contracts between them and your petitioners, freight received at or destined to said Jay Street Terminal station. The complainant railroad companies for several years past have held and

now hold themselves out as common carriers to and from Jay Street Terminal, both by their practice of receiving and delivering freight at said point, and by their tariffs, which are now and for several years past have been duly published and filed with the Interstate Commerce Commission. The liability under their respective bills of lading attaches to the railroad companies on west-bound shipments from the time the freight is received at such terminal station, and does not end on eastbound shipments until the freight is delivered into the hands of the consignee at such terminal station. The bill of lading issued by the railroad companies for freight so received or delivered by them by its terms covers and includes the movement afloat.

The Jay Street Terminal is a union freight terminal and is designated as a regular public freight terminal of the complainant railroad companies in their tariffs duly filed with the Interstate Commerce Commission.

157. Under and pursuant to said contracts the Jay Street Terminal acts as the agent of complainant railroad companies in the receipt, handling and delivery of freight at said terminal and the transportation thereof between said terminal and the rail terminals of complainant railroad companies on the western shore of New York Harbor.

Under and pursuant to said contracts, the said Jay Street Terminal floats eastbound freight from the rails on the western shore of New York Harbor to the decks, wharves and float bridges at Brooklyn and there unloads it from the cars and delivers it to the consignees; it receives westbound freight from the shippers and loads it into cars and floats the cars loaded to the said rails. It is agreed that a competent superintendent shall be kept upon the premises who shall carry out the directions of complainant railroad companies and said superintendent has authority to issue bills of lading on behalf of each of the several complainant railroad companies for westbound freight and to sign the same as agent of the railroad companies. Jay Street Terminal also agrees to be responsible for and pay to the railroad companies all freight charges on eastbound freight and all freight charges payable in advance on westbound freight and accordingly collects and accounts for the same. It agrees to insure against loss or damage by fire or marine risks all freight, cars or property while in its possession, received by it under the provisions of said contracts, said insurance to be for the benefit of the railroad companies and others as their interests shall appear. It also agrees to enforce the car service regulations of the railroad companies as established from time to time and filed and published in accordance with the

158. act to regulate commerce and the amendments thereto and supplements thereto. It performs the movement in either direction of empty cars between the Jay Street Terminal and the railroad companies' terminals on the west shore of New York Harbor; issues waybills and performs other necessary clerical services and in general furnishes all facilities and performs all work and services required for the receipt or delivery of freight as at any public station of the

railroad companies; and for the transportation of said freight between the Jay Street Terminal and complainant railroad companies' terminals on the west shore of New York Harbor.

In consideration of these services each of the railroad companies has agreed to pay to Jay Street Terminal, compensation as follows, to wit:

On freight handled by its said agent originating at or destined to points west of the western termini of the contracting railroad companies (that is, west of trunk line territory, which embraces in general all that portion of the United States lying north of the Potomac and Ohio Rivers, and east of Buffalo and Salamanca, New York, and Pittsburg, Pennsylvania), four and one-fifth cents per hundred pounds, and on freight originating at or destined to points east thereof, three cents per hundred pounds, with certain exceptions noted in said Exhibit "A."

The Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn. It is the only convenient and accessible freight station of the railroad companies for the

shippers of that territory. No independent terminals other

159 than the Jay Street Terminal are conveniently accessible to the shippers of that territory. In no other practicable way could the railroad companies in the past, nor can they at present, serve the large and important shipping interests of this section of Brooklyn, than by the maintenance of the Jay Street Terminal as a public freight station of complainant railroad companies. The Jay Street Terminal was enlarged in 1905 in response to a public demand for a public union railroad freight terminal on the water front of Brooklyn at or near the foot of Bridge Street. A petition of manufacturers and merchants of Brooklyn was presented to the public authorities of the city of New York, setting forth the urgent public necessity of such a terminal and praying that Bridge Street for one block back from the East River should be closed to make the enlargement of the terminal possible. The prayer of the petition was granted and the street closed and for the land in the street, Jay Street Terminal paid the city of New York, \$32,000. The enlargement was necessary to accommodate the large and increasing tonnage including the refined sugar offered to the railroad companies at this terminal by Arbuckle Brothers. No claim was ever made by anyone up to 1907, that Jay Street Terminal was for any reason disabled to receive and transport Arbuckle Brothers' sugar and be paid therefor as for other freight of other consignors and in 1909 the Interstate Commerce Commission dismissed the petition of the Federal Sugar Refining Company which challenged such carriage and payment.

The carriage of Arbuckle Brothers' sugar and payment therefor according to the latest decision of the Interstate Commerce Commission were lawful until July, 1909, and according to such decision became unlawful only because of the acts of the Federal

160 Sugar Refining Company hereinafter set forth and refusals of the complainant railroad companies to make payments to it.

VII. That your petitioners under their firm name, Arbuckle Brothers, operate a sugar refinery in the Borough of Brooklyn, located upwards of a block from the Jay Street Terminal. Their shipments of sugar are carted to the terminal by Arbuckle Brothers and handled at the terminal by the Jay Street Terminal in the same way as the freight of hundreds of other shippers and the freight charges thereon are collected by the Jay Street Terminal in accordance with the regularly published tariffs. That approximately four-fifths of the shipments of sugar made by Arbuckle Brothers through Jay Street Terminal are sold f. o. b. Brooklyn and become the property of the consignee immediately upon delivery to the terminal and loading into cars at the terminal. That during the first six months of 1907, the bills of lading issued by the Jay Street Terminal for shipments of general merchandise numbered 93,622, of which 3,969 were for your petitioners' sugar and 1,210 for their coffee and their shipments and receipts constituted less than one-third of the total tonnage moving through the terminal. That during the same period the number of different consignees who received freight at the terminal was about 765 and the number of different shippers through the terminal about 560. That the moneys paid to the Jay Street Terminal by the railroad company were no more than a just and reasonable charge and allowance for the services rendered. The year 1907 is selected because the results of that year were shown before the Interstate Commerce Commission.

161. VIII. On information and belief your petitioners further allege:

That the Federal Sugar Refining Company is a corporation of the State of New York, having its executive offices at 138 Front Street, in the city of New York, and having its refineries from which it ships all its outbound products, including sugar, and at which it receives all its inbound supplies for manufacture of sugar and commodities allied thereto, on the east bank of the Hudson River, within the corporate limits of the city of Yonkers, and more than ten miles distant from the northernmost boundary of the lighterage limits of the complainant railroad companies. The said refineries are located on the line of the New York Central and Hudson River Railroad Company, with which they have switch connections and over which the Federal Sugar Refining Company ships the greater part of its output and receives a large part of its inbound shipments. Over this railroad, with few exceptions, the rates to points in the shipping territory of the Federal Sugar Refining Company are the same as the rates from the Jay Street Terminal over the lines of complainant railroad companies. That in order to make shipments of its sugar from Yonkers via the lines of complainant railroad companies, at the New York rate, the Federal Sugar Refining Company must deliver such shipments to the New York Central and Hudson River Railroad Company at Yonkers, thence to be transported by that railroad to New York and there delivered to complainant railroad companies at points within the lighterage limits. Because of alleged delay in the handling and transportation of such

shipments via the route aforesaid, the Federal Sugar Refining Company prefers to deliver said shipments directly to complainant railroad companies by lighter within the lighterage limits. Prior to July, 1909, the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, was accustomed to deliver its shipments at Yonkers to the Ben Franklin Transportation Company, which transported the same direct to the terminals of complainant railroad companies on the west shore of New York Harbor, at a charge to the Federal Sugar Refining Company of Yonkers of three cents per hundred pounds.

In the month of May, 1907, the Federal Sugar Refining Company of Yonkers filed a complaint with the Interstate Commerce Commission against complainant railroad companies, alleging that the complainant through the Ben Franklin Transportation Company performed the same service on its shipments of sugar as were said to be performed by the Brooklyn Eastern District Terminal on shipments of the American Sugar Refining Company and by the Jay Street Terminal on shipments of the Arbuckle Brothers; that the lighterage limits prescribed by complainant railroad companies were unduly discriminatory in that they did not extend to Yonkers and include the refinery of the Federal Sugar Refining Company of Yonkers, and permitted allowances to be made on shipments of sugar from the refineries of your petitioners and the American Sugar Refining Company, while not so permitting on the complainant's shipments because the latter was located outside the prescribed limits. Said practice was said to result in unjust discrimination and undue prejudice, and to oblige the Federal Sugar Refining Com-

pany to pay unreasonable rates. A copy of said complaint is 163 annexed to the petition of the complainant railroad companies and marked Exhibit "B." A copy of the answer filed by one of the complainant railroad companies is thereto annexed and marked Exhibit "C," and is representative of the answers filed by all of the complainant railroad companies. Hearings were held thereafter and on the 24th day of June, 1909, in the aforesaid proceeding known as Docket No. 1082, the said Interstate Commerce Commission made its report and order, a copy of which is annexed to the petition of the complainant railroad companies and marked Exhibit "D." The said report and order of the Interstate Commerce Commission in Docket No. 1082 was to the effect that said complaint should be dismissed because the extension of the lighterage limits in New York Harbor was a matter of business discretion and that said commission had no authority to require such extension beyond the then prescribed boundaries, and that complainant being located outside of the prescribed lighterage limits was not subjected to unlawful discrimination by reason of the practice of complainant railroad companies in affording free lighterage on shipments originating at or destined to points within said lighterage limits, while refusing to so afford on complainant's shipments.

On information and belief your petitioners further allege: That as a device to appear to ship from within the lighterage limits, and

within a month after the issuance of said report and order, a new corporation known as the "Federal Sugar Refining Company" was organized, which established its principal office at 138 Front Street, New York City, and took over the refineries heretofore mentioned

in the city of Yonkers, and adopted the following practice:

164 Contracts of sale or orders for sugar were received at 138 Front Street and each of said orders was given a separate contract number, and said order bearing the contract number was forwarded to the refinery where the order was filled and the barrels or bags were stamped with the contract number and placed on a lighter. The shipment bearing the contract number remained intact until it reached the hands of the buyer. The refinery received shipping instructions from 138 Front Street, and these shipping instructions showed the contract number, the ultimate destination, and the rail line over which the shipment was to be transported. The captain of the lighter of the Ben Franklin Transportation Company gave a receipt to the refinery and received from the refinery a so-called bill of lading, which was no more than a form of railroad bill of lading filled in by the Federal Sugar Refining Company and designating a consignment to the Federal Sugar Refining Company, 138 Front Street, New York City, to be transported by the Ben Franklin Transportation Company and showing the contract number with which the shipment had been marked. The said document or alleged bill of lading was not signed by the Ben Franklin Transportation Company through any of its officers, or the captain of the lighter, or by any other carrier. There was nothing in any of the documents which called for transportation to Pier 24, North River. The said shipping instructions sent from 138 Front Street to Yonkers were to ship to "Federal Sugar Refining Company"—138 Front Street, City—"B. F. T. Co. (B. & O.)" or other initials representing

165 the Ben Franklin Transportation Company and one of complainant railroad companies as the case may have been. That none of complainant railroad companies could or did perform any transportation service in connection with the Ben Franklin Transportation Company between Yonkers and 138 Front Street, and such shipping instructions were, in fact, directions to deliver said shipments to the Ben Franklin Transportation Company to be lightered and delivered to one of the railroad companies at its terminal on the west shore of New York Harbor. The practice has been for the lighter of the Ben Franklin Transportation Company to go to Pier 24, North River, New York, part of which pier is leased to the Ben Franklin Transportation Company, where the captain of the lighter called up the office of the Federal Sugar Refining Company at 138 Front Street and reported the particular shipment then on his lighter. The captain of the lighter was then handed a form of bill of lading not signed by any of complainant railroad companies and showing the name and address of the consignor as the Federal Sugar Refining Company, 138 Front Street, New York, Franklin Street, Pier 24, North River. The lighter then proceeded to the rail terminus of such of complainant railroad companies as had

been previously designated in the shipping instructions sent to Yonkers, and there deliver the shipment and obtained the signature of the railroad agent at said terminus upon the form of bill of lading theretofore prepared and delivered to said captain as aforesaid, and said bill of lading was stamped by the said agent to show the receipt of the shipment at said station on the west shore of New York Harbor.

That such shipments were handled under contract between 166 the Ben Franklin Transportation Company and the Federal Sugar Refining Company for a compensation of three cents per hundred pounds, although the said contract provides for a compensation of four cents per hundred pounds on sugar lightered from Yonkers to Pier 24, North River, payments for said service being made to the Ben Franklin Transportation Company under that provision which provides for a compensation of three cents per hundred pounds for sugar lightered from Yonkers to complainant railroad companies rail termini.

IX. That having established the practice hereinbefore described, the said Federal Sugar Refining Company filed a complaint in October, 1909, with the Interstate Commerce Commission against complainant railroad companies, a copy of which, together with a copy of the answer of one of complainant railroad companies as representative of the answers filed by all of complainant railroad companies, are annexed to the petition herein of the railroad companies and marked Exhibits "E" and "F," respectively. Said complaint alleged in substance that the interstate transportation of the product of the said Federal Sugar Refining Company began at Pier 24, North River, Borough of Manhattan, a point within the lighterage limits as aforesaid, and that said Jay Street Terminal is owned and conducted by copartners, named John Arbuckle and William A. Jamison, which said copartners owned, maintained, and operated also a sugar refinery at the foot of Jay Street, Borough of Brooklyn. The petition also alleged that said amounts of three cents per hundred pounds and

167 four and one-fifth cents per hundred pounds were paid to said copartners for the lightering of their sugar from Jay Street, Brooklyn, to the rail termini of complainant railroad companies on the west bank of New York Harbor and that inasmuch as the said Federal Sugar Refining Company was a competitor of the said Arbuckle and Jamison in the sugar business, it constituted an undue and unreasonable prejudice and disadvantage against said Federal Sugar Refining Company to pay said amounts of three cents and four and one-fifth cents per hundred pounds for the handling of sugar to said Arbuckle and Jamison and not to pay similarly to the said Federal Sugar Refining Company.

X. That hearings were had before the Interstate Commerce Commission upon the last-mentioned complaint on the 25th day of February, 1910, and on the 13th day of April, 1910; and subsequently, to wit, on the 6th day of March, 1911, the Interstate Commerce Commission issued its report and order against complainant railroad companies, being the order first hereinabove referred to,

a copy of which report and order is attached to the petition of the railroad companies and marked Exhibit "G," requiring complainant railroad companies to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter, to abstain from paying what the said Interstate Commerce Commission has termed allowances to said John Arbuckle and William A. Jamison, copartners trading under the firm name of Arbuckle Brothers, on the sugar of the latter, while at the same time paying no such allowances to said Federal Sugar Refining Company on its sugar. The order makes it optional with the railroad companies to keep or break their contracts with Jay Street Terminal, de-
168 pending on their election to pay or not to pay the contract prices to Federal Sugar Refining Company.

XI. That payment to the Federal Sugar Refining Company for lighterage service from Pier 24, North River, to any terminal of the railroad companies on the western shore of New York Harbor of the same amount which may reasonably be paid and is paid to the Jay Street Terminal for the performance of the floating service furnished by it would be an unjust and unreasonable allowance to the Federal Sugar Refining Company and a discrimination against your petitioners and therefore in violation of the law, inasmuch as the lighterage from Pier 24, North River, to the western shore of New York Harbor costs the Federal Sugar Refining Company nothing, being included without extra charge in the service required by it from Yonkers to the lighterage limits by reason of the fact of the location of its plant at Yonkers.

If, on the other hand, complainant railroad companies should comply with said order of the commission by not paying any allowance as aforesaid to said Federal Sugar Refining Company and refraining from paying any compensation to the Jay Street Terminal for transporting Arbuckle Brothers' sugar, then your petitioners would be deprived of their property without due process of law, their contracts with the railroad companies would be broken and cancelled, their real estate, docks, railroad yards, railroad warehouses, platforms, and their railroad and floating equipment would be of diminished value, and they would be denied the full use of their property or just and reasonable compensation for the use of their property.

169 XII. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in finding in said report and order that the practice of stopping the lighter at Pier 24, North River, en route from Yonkers to Jersey City, or other terminal of one of complainant railroad companies, as above described, is different in substance or in legal effect from the practice formerly followed by the Federal Sugar Refining Company of having shipments lightered direct from Yonkers to such terminal, and differentiates the present case from that formerly before the commission in Docket No. 1082, and in holding that by reason of the stoppage of such lighter at Pier 24, North River, the shipments of the Federal Sugar Refining Company origi-

nate within lighterage limits. Such finding is wholly unsupported by evidence.

XII. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in finding in said report and order that complainant railroad companies refused to bear the burden of lighterage across the river sugar for the Federal Sugar Refining Company, inasmuch as complainant railroad companies now and at all times referred to in this petition hold themselves out, and have held themselves out, as ready to accept shipments of the Federal Sugar Refining Company at any point within the lighterage limits and to lighter the same to their respective terminals on the western shore of New York Harbor at their own expense. Such finding is wholly unsupported by evidence.

XIV. That the commission violated the constitutional rights
170 of your petitioners, exceeded the powers delegated to it by law
and otherwise erred in finding in said report and order that
Arbuckle Brothers delivered their shipments to complainant rail-
road companies on the Jersey shore at their own risk, and that at
that point and time the liability of complainant railroad companies
as common carriers commenced, and that up to that point there is
no transportation of the sugar, but only an accessory service by
Arbuckle Brothers in delivering their own shipments to the carrier
for transportation. That such sugar of Arbuckle Brothers is in fact
covered by the bill of lading of one of complainant railroad companies
from the time that it is delivered to the Jay Street Terminal
for shipment, and the complainant railroad company whose bill of
lading is thus issued is legally liable, if the bill of lading be an order
bill of lading, to the lawful holder thereof, and if it be a straight
bill of lading, to the consignee or owner of the shipment, who in
either case may be and generally is a party other than Arbuckle
Brothers, from the time of such delivery to the Jay Street Terminal.
That the service performed by the Jay Street Terminal is not an ac-
cessory service, but a service connected with and a part of the
transportation and the furnishing of instrumentalities used therein,
inasmuch as such service and the furnishing of such instrumentalities
is covered by the tariffs of complainant railroad companies on
file with the Interstate Commerce Commission, and is a service which
complainant railroad companies hold themselves out as common
carriers to perform under such tariffs and by their general practice,
and which may lawfully be performed by the owner of property
with respect to his own property for a just and reasonable
171 compensation paid by the carrier. Such finding is wholly
unsupported by evidence.

XV. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in its report and order in holding that complainant railroad companies may not lawfully employ, for public station facilities, the facilities owned and operated by Jay Street Terminal and make

reasonable compensation therefor to the owner thereof without at the same time permitting Federal Sugar Refining Company to perform a different service for the same compensation. Such finding is wholly unsupported by evidence.

XVI. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in its report and order in finding that Arbuckle Brothers and the Federal Sugar Refining Company provide similar facilities and perform the same service in the transportation of their property to the terminals of complainant railroad companies on the western shore of the Hudson River. Such finding is wholly unsupported by evidence.

XVII. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in its report and order in finding that the contractual arrangement between complainant railroad companies and the Jay Street Terminal saves Arbuckle Brothers the expense of teaming or conveying the merchandise to a public terminal. Such finding is wholly unsupported by the evidence.

172 XVIII. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in finding in its report and order that complainant railroad companies make an allowance to Arbuckle Brothers for the lighterage of their sugar. All payments made by complainant railroad companies to the Jay Street Terminal are made on account of all the services performed and the facilities furnished by the Jay Street Terminal, and the payments of three cents and four and one-fifth cents per hundred pounds in connection with particular shipments are not payments made for lighterage service alone or in respect of any particular shipment, and are not dependent upon the ownership or the shipper of any particular shipment, but are made as a means and measure of compensation for all the general service performed on behalf of complainant railroad companies by said Jay Street Terminal as a whole. Such finding is wholly unsupported by evidence.

XIX. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law, and otherwise erred in its report and order in requiring an allowance to be made to the Federal Sugar Refining Company for a lighterage service measured by the amount paid to the Jay Street Terminal for the floating service performed by it. Such payments to the Federal Sugar Refining Company, if made at all, must be made for the performance by it of a part of the lighterage service from Pier 24 to the terminals of complainant railroad companies on the western shore of

173 New York Harbor, and must be a just and reasonable compensation for such service and not measured by the payment to the Jay Street Terminal. Such finding is wholly unsupported by evidence.

XX. That the commission violated the constitutional rights of your petitioners, exceeded the powers delegated to it by law and otherwise erred in its report and order in finding that complainant railroad companies unduly discriminated against the Federal Sugar Refining Company and unduly preferred Arbuckle Brothers in violation of the Act to Regulate Commerce, because:

(a) The circumstances and conditions attending the shipment and transportation of Arbuckle Brothers sugar from the Jay Street Terminal are substantially dissimilar from the circumstances and conditions attending the shipments of the Federal Sugar Refining Company as shown by the facts hereinbefore set forth.

(b) No preference or advantage accrues to Arbuckle Brothers or prejudice or disadvantage is sustained by the Federal Sugar Refining Company by reason of the lighterage of the sugar of Arbuckle Brothers by the Jay Street Terminal and the payment by complainant railroad companies to said Jay Street Terminal of a just and reasonable amount therefor, and the refusal of complainant railroad companies to make an allowance to the Federal Sugar Refining Company for the lighterage of its sugar to the terminals of complainant railroad companies on the west shore of New York Harbor. The payment to the Jay Street Terminal being no more than just and reasonable compensation for the service performed is only equivalent

to the performance of that service by complainant railroad

174 companies which complainant railroad companies would be required to and would perform with their own equipment if the floating of such sugar by the Jay Street Terminal and the payment therefor were discontinued. Complainant railroad companies now, and during all the time referred to in this petition hold themselves out and have held themselves out as willing to perform the same service from any point within the lighterage limits for the Federal Sugar Refining Company in accordance with their tariffs on file with the Interstate Commerce Commission. Whatever disadvantage the Federal Sugar Refining Company may be under, arises out of the location of its refineries at Yonkers, beyond the lighterage limits of complainant railroad companies. Such finding is wholly unsupported by evidence.

XXI. That if the complainant railroad companies are obliged to obey the order of the commission pending final determination of this action your petitioners will suffer and sustain irreparable damage. Either the railroad companies will discontinue compensation to the Jay Street Terminal for transportation of Arbuckle Bros. sugar or they will pay to the Federal Sugar Refining Company for its lighterage service the same compensation they pay to the Jay Street Terminal for its floating service. If they discontinue compensation to Jay Street Terminal it must transport Arbuckle Bros. sugar without compensation or greatly decrease its business and plant. If the complainant railroad companies pay the same compensation to the Federal Sugar Refining Company for lighterage service as they pay the Jay Street Terminal for floating service an unjust

175 discrimination is worked against Arbuckle Bros., as refiners of sugar. A great public wrong would be done by the crippling of the Jay Street Terminal as a public station which would follow the diminution of the transportation facilities it could offer if it were forced by the order complained of to curtail its service. Forty per cent of the freight handled in 1910 was Arbuckle Brothers' sugar, and if the Jay Street Terminal may not handle this sugar it must greatly cut down its service and great inconvenience and expense to a great number of shippers and receivers of freight would follow who have no access to private wharves or piers and who would be required to transport their shipments by truck to and from distant public stations.

Wherefore your petitioners pray:

1. That they may intervene and be made parties to this record and joined as petitioners with the petitioning railroad companies;
2. That a final decree may be entered herein setting aside and annulling the order of the Interstate Commerce Commission, dated December 5, 1910;
3. That a temporary injunction may issue herein suspending said order and any and all proceedings thereunder pending the final determination of this proceeding.

Dated New York, May 12, 1911.

DYKMAN, OELAND & KUHN,
Solicitors for Petitioners.

176 STATE OF NEW YORK,

County of Kings, ss:

William A. Jamison, being duly sworn, says that he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

Sworn to before me this 12th day of May, 1911.

WILLIAM A. JAMISON.

HENRY J. RENDICH,

Notary Public Kings Co.

[SEAL.]

177 *Order allowing John Arbuckle and William A. Jamison to intervene.*

Entered May 17, 1911.

In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS,

vs.

THE UNITED STATES, RESPONDENT.

} No. 38.

On motion of John Arbuckle and William A. Jamison, composing the copartnership known as the Jay Street Terminal and composing the copartnership known as Arbuckle Brothers, by William N.

Dykman, their solicitor, in open court made, due notice having been given in that behalf, that they be allowed to intervene and become parties to the above-entitled proceedings, and having duly filed and presented a petition in that behalf—

It is ordered that the said John Arbuckle and William A. Jamison, composing the copartnership known as the Jay Street Terminal and composing the copartnership known as Arbuckle Brothers, be, and they are hereby, allowed to intervene in and become parties to the above-entitled cause and to be represented by their counsel.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

Filed May 12, 1911.

In the United States Commerce Court.

THE BALTIMORE AND OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; ERIE RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; NEW YORK, ONTARIO AND WESTERN RAILROAD COMPANY; AND THE PENNSYLVANIA RAILROAD COMPANY, petitioners,

No. 38.

v.

THE UNITED STATES.

MOTION OF THE UNITED STATES TO DISMISS THE PETITION.

The Attorney General of the United States of America, in behalf of the United States, moves the court to dismiss the petition upon the following grounds, viz:

(1) It appears from the said petition and the exhibits that the same are insufficient as not setting forth a cause of action upon which the court may grant the relief prayed or any part of the same.

(2) It appears from the said petition and the exhibits that the said petitioners have not shown that there is any equity in their said petition upon which to grant the relief prayed or any part of the same, or that they are entitled to the relief prayed or to any part of the same.

179 (3) It appears from the said petition and the exhibits that the said petitioners have not in and by their said petition shown that in making its said order the Interstate Commerce Commission acted beyond its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce.

(4) It appears from the said petition and the exhibits that the said petitioners have not in and by their said petition shown that

in making its said order the Interstate Commerce Commission violated any right of the petitioners protected by the Constitution of the United States or any other right of the said petitioners over which this court may exercise jurisdiction.

(5) That in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, said Interstate Commerce Commission found that the transportation of the sugar of Arbuckle Brothers and the transportation of the sugar of Federal Sugar Refining Company in fact commenced at the termini of the said petitioners on the Jersey shore, and that the actual contractual relation between the said two shippers and the said petitioners for the transportation and the liability of the said petitioners as common carriers did not commence previous to the time the sugar of each shipper was de-

livered to the said petitioners at that point; all of which 180 were matters within the power of that body to hear and determine, and its report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to disturb the same.

(6) That in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion, together with its decision, order, or requirement in the premises, the said Interstate Commerce Commission found that the services rendered by the Federal Sugar Refining Co. and the services rendered by Arbuckle Bros. in delivering sugar to the petitioners at the Jersey shore were similar services; and that in granting the allowance to Arbuckle Bros. and withholding the same from the Federal Sugar Refining Co., the petitioners unduly discriminate against said Federal Sugar Refining Co. and unduly prefer the said Arbuckle Bros. in violation of the act to regulate commerce; all of which were matters within the power of that body to hear and determine, and its said report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to disturb the same.

(7) That in its report in writing in respect to the matters and things heard and determined by the Interstate Commerce Commission, which states its conclusion together with its decision, order, or requirement in the premises, said Interstate Commerce Commission found that the terms under which the petitioners accept the 181 sugar of Arbuckle Bros. at their regular stations west of the

river result in inequalities, preferences, and discriminations, and are unduly and unjustly prejudicial to the rights of the Federal Sugar Refining Co. as a shipper of sugar over the lines of the petitioners in competition with Arbuckle Bros. in the same markets, in violation of the act to regulate commerce; all of which were matters within the power of that body to hear and determine, and

its said report and order in the premises are conclusive upon the court and the matters and things alleged in the petition are insufficient to disturb the same.

(8) That in its report in writing, which states its conclusion together with its decision, order, or requirement in the premises, it appears that in the proceedings had and taken before the Interstate Commerce Commission, that body heard and determined matters within its power and authority, and its report made and order entered are conclusive upon the court; and the matters and things alleged in the petition are insufficient to disturb the same.

Wherefore and for divers other good causes appearing from the face of the said petition and the exhibits, this defendant prays that its motion be sustained and that the said petition be dismissed at the petitioners' cost, and that it be not required to make any answer thereto; and for such other and further action as may be appropriate.

Geo. W. WICKERSHAM,
Attorney General of the United States.

182 *Order extending motions to dismiss petition to cover intervening petitions.*

Entered May 17, 1911.

In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL, PETITIONERS,

vs.

UNITED STATES, RESPONDENT.

} No. 38.

On motion of the respondent, the United States, by Blackburn Esterline, Special Assistant to the Attorney General, in open court made, it is by the court ordered, that the motion filed by the United States to dismiss the petition in the above-entitled cause filed by the petitioners be extended to and made a motion to dismiss the intervening petition of John Arbuckle and William A. Jamison, and the intervening petition of Brooklyn Eastern District Terminal filed in the above-entitled cause; and it is further ordered, that the said motion to dismiss the petition shall be taken and considered as a motion also to dismiss the said two intervening petitions to the same extent and in the same manner as if the said motion were filed and made to each of the said intervening petitions to dismiss the same and each of them.

And on motion of the Interstate Commerce Commission, by P. J. Farrell, its counsel, in open court made, it is further ordered, that the motion filed by the Interstate Commerce Commission and the Federal Sugar Refining Company to dismiss the petition in the above-entitled cause filed by the petitioners, be extended to and made a motion to dismiss the intervening petition of John Arbuckle and

William A. Jamison, and the intervening petition of Brooklyn Eastern District Terminal filed in the said cause; and it is further ordered, that the said motion to dismiss the petition shall be taken and considered as a motion also to dismiss the said two intervening petitions to the same extent and in the same manner as if the said motion were filed and made to each of the said intervening petitions to dismiss the same and each of them.

183 By the court:

MARTIN A. KNAPP,
Presiding Judge.

184

Order denying motions to dismiss.

Entered May 22, 1911.

In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
petitioners,
v.
THE UNITED STATES, RESPONDENT. } May term, 1911,
 } No. 38.

On motions to dismiss the petition filed in said action for the reason that the facts therein stated do not constitute a cause of action.

Mr. P. J. Farrell, Mr. Blackburn Esterline, and Mr. Ernest A. Bigelow, counsel for intervening defendants, appearing for the motions; and Mr. George F. Brownell, solicitor for the petitioners; Mr. Closson, solicitor for the intervening petitioner, Brooklyn Eastern District Terminal; and Mr. Dykman, solicitor for the intervening petitioners, John Arbuckle and William A. Jamison, doing business under the firm name of the Jay Street Terminal, appearing contra;

The above-entitled cause came on for hearing before the United States Commerce Court at a regular session of said court held in the city of Washington on the 17th day of May, 1911, upon motions made by the United States, the Interstate Commerce Commission, and the Federal Sugar Refining Company to dismiss.

And the court having considered said motions and the arguments of counsel in support thereof and the petition filed in said cause, and due consideration thereof being had;

185 Now, on this 22nd day of May, 1911, it is ordered and adjudged that said motions be, and the same are hereby, denied, with leave to the defendants making said motions to answer the petition of the petitioners within twenty (20) days from the date hereof, if they shall be so advised.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

186 *Order granting motion for temporary injunction.*

Entered May 22, 1911.

In the United States Commerce Court.

THE BALTIMORE & OHIO RAILROAD COMPANY et al., petitioners.

May term, 1911. No. 38.

UNITED STATES, RESPONDENT.

On motion for a temporary injunction enjoining the enforcement of an order of the United States Interstate Commerce Commission, made December 5th, 1910, and effective on or before the 15th day of April, 1911, said last mentioned date having been extended by the commission to June 1st, 1911.

Mr. George F. Brownell, solicitor for the petitioners; Mr. Closson, solicitor for the intervening petitioner, Brooklyn Eastern District Terminal; and Mr. Dykman, solicitor for the intervening petitioners, John Arbuckle and William A. Jamison, doing business under the firm name of the Jay Street Terminal, appearing for the motion; Mr. P. J. Farrell, Mr. Blackburn Esterline, and Mr. Ernest A. Bigelow, counsel for intervening defendants, appearing contra.

The above entitled cause came on for hearing before the United States Commerce Court at a regular session thereof held at the city of Washington, May 17th, 1911, upon the petition of the petitioners and the intervening petitions of the Brooklyn Eastern District Terminal and the Jay Street Terminal, and affidavits submitted by petitioners in support of their petition.

The court having heard the arguments of counsel, and considered the pleadings and affidavits presented in support of the motion, and having given the same due consideration:

187 Now, on this 22d day of May, 1911, it is ordered and adjudged that the motion for a temporary injunction for the purposes herein mentioned be and the same is hereby granted.

And it is further ordered and adjudged that said order, to wit:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above-named defendants to Arbuckle Brothers on their sugar brought by them on floats from lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complainants and unduly prefer said Arbuckle Brothers, in violation of the act to regulate commerce;

"It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on and after the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the commission in said report to be unduly discriminatory and in violation of the act to regulate commerce;"

and its force and effect be, and the same hereby is, suspended until the further order of this court.

And it is further ordered and adjudged that a duly certified copy of this order be served upon the chairman of the Interstate Commerce Commission.

By the court:

(Signed) MARTIN A. KNAPP,
Presiding Judge.

Certified copy of the foregoing order served on the chairman of the Interstate Commerce Commission this 23rd day of May, 1911.

(Signed) F. J. STAREK, *Marshal.*

Accepted by:

(Signed) W. J. HOWELL.

Certified copy of the foregoing order served on the Attorney General of the United States this 25th day of May, 1911.

(Signed) F. J. STAREK, *Marshal.*

Accepted by:

(Signed) B. M. MOORE for
BLACKBURN ESTERLINE.

188 *Order allowing United States and Federal Sugar Refining Company to withdraw answers and file motions to dismiss.*

Entered October 10, 1912.

In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS, |
v.
UNITED STATES, RESPONDENT. | No. 38.

ORDER.

On motion made in open court by counsel for the United States, respondent herein, and counsel for the Federal Sugar Refining Company, intervening respondent herein, all parties being represented and no objection being made:

It is ordered, That the United States and the Federal Sugar Refining Company hereby have leave to withdraw their several answers herein and enter motions to dismiss the petition.

MARTIN A. KNAPP,
Presiding Judge, United States Commerce Court.

OCTOBER 9, 1912.

189 *Motion of United States and Federal Sugar Refining Company to dismiss.*

Filed October 10, 1912.

In the United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS,

vs.

UNITED STATES, RESPONDENT.

No. 38.

MOTION TO DISMISS.

Come now the United States and the Federal Sugar Refining Company, parties respondent in the above entitled suit, by their respective solicitors, and move this honorable court to dismiss the petition of the above-named petitioners in said suit, and in support of said motion show:

That the allegations contained and the facts set forth in said petition do not constitute a cause of action or entitle said petitioners to the relief or any of the relief asked for by them in and by said petition.

WINFRED T. DENISON,
Assistant Attorney General,
ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining Company.

OCTOBER 9, 1912.

190

Journal entry.

Proceedings of October 21, 1912.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS;

Brooklyn Eastern District Terminal, John Arbuckle, and
Wm. A. Jamison, intervening petitioners,

vs.

No. 38.

UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION, Federal Sugar Refining Company, intervening respondents.

In said cause it was announced to the court that counsel present understand that the testimony before the Interstate Commerce Commission in Docket Nos. 1082 and 2888, Federal Sugar Refining Company of Yonkers v. Baltimore & Ohio Railroad Company et al., is not in evidence before the court. Thereupon this cause, upon stipulation of counsel made in open court, came on for final hearing upon the merits on the motions to dismiss of the United States, Interstate Commerce Commission, and Federal Sugar Refining Company, the answers of the United States and the Federal Sugar Refining Company having been withdrawn pursuant to leave of court; Mr. Winfred T. Denison, Assistant Attorney General, appearing on behalf of

the United States; Mr. Ernest A. Bigelow on behalf of the Federal Sugar Refining Company; Mr. George F. Brownell on behalf of the petitioners, and Mr. William N. Dykman and Mr. Henry B. Clossen on behalf of the intervening petitioners.

191 *Journal entry.*

Proceedings of October 22, 1912.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS:

Brooklyn Eastern District Terminal, John Arbuckle, and
Wm. A. Jamison, intervening petitioners.

vs.

No. 38.

UNITED STATES, RESPONDENT: INTERSTATE COMMERCE COMMISSION, Federal Sugar Refining Company, intervening respondents.

This cause came on for further hearing upon the merits on the motions to dismiss of the United States, Interstate Commerce Commission, and Federal Sugar Refining Company, and the arguments of counsel were concluded, Mr. P. J. Farrell, appearing on behalf of the Interstate Commerce Commission; Mr. Ernest A. Bigelow on behalf of the Federal Sugar Refining Company; Mr. Winfred T. Denison, Assistant Attorney General, on behalf of the United States; and Mr. George F. Brownell on behalf of the petitioners. Thereupon, counsel for the United States was given leave to file a brief, and Mr. George F. Brownell was given leave to file a brief in reply. Thereupon, the cause was taken under advisement by the court.

192 *Opinion and dissenting opinion.*

Filed November 15, 1912.

United States Commerce Court.

No. 38.—October Session, 1912.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS: Brooklyn Eastern District Terminal, John Arbuckle and William A. Jamison, intervening petitioners.

v.

UNITED STATES, RESPONDENT: INTERSTATE COMMERCE COMMISSION, Federal Sugar Refining Company, intervening respondents.

ON FINAL HEARING ON MOTIONS TO DISMISS.

(For opinion of Interstate Commerce Commission, see 20 I. C. C. Rep., 200.)

Mr. George F. Brownell, with whom Mr. H. A. Taylor was on the brief, for the petitioners.

Mr. Henry B. Closson and Mr. William N. Dykman, for the intervening petitioners.

Mr. Winfred T. Denison, Assistant Attorney General, and Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission,
193 Mr. Ernest A. Bigelow for the Federal Sugar Refining Company.

Before Knapp, presiding judge, and Hunt, Garland, and Mack, judges.

[November 15, 1912.]

CARLAND, Judge:

The petition in this case was filed April 12, 1911, and seeks to have annulled and set aside an order of the Interstate Commerce Commission, dated March 6, 1911, the provisions of which are hereinafter stated. On April 19, 1911, upon its own petition, the Federal Sugar Refining Company was made a party defendant, with leave to appear and be represented by counsel. On May 11, 1911, the Interstate Commerce Commission and the Federal Sugar Refining Company filed a motion to dismiss the petition for the reason that the facts set forth therein did not constitute a cause of action, and on the same day the Brooklyn Eastern District Terminal Company, upon leave granted, filed its intervening petition. On May 12, 1911, the United States filed a motion to dismiss for the reason, among others therein stated, that the petition did not show there was any equity therein upon which to grant the relief prayed or any part of the same. On the same day the Jay Street Terminal and Arbuckle Brothers, upon leave granted, filed their intervening petition. On May 17, 1911, upon motion of Mr. Blackburn Esterline, assistant to the Attorney General, it was

194 ordered that the motion to dismiss the petition filed by the United States be extended and considered as a motion to dis-

miss the intervening petition of Arbuckle Brothers and Brooklyn Eastern District Terminal, and upon motion of Mr. P. J. Farrell, counsel for the Interstate Commerce Commission, it was ordered that the motion to dismiss the petition filed by the Interstate Commerce Commission and the Federal Sugar Refining Company be extended to and considered as a motion to dismiss the intervening petition of Arbuckle Brothers and the Brooklyn Eastern District Terminal.

On May 17, 1911, the motions for a temporary injunction made by the petitioners and intervening petitioners and the motions to dismiss came on for hearing before the court; and thereafter, on May 22, 1911, the motions to dismiss were by the unanimous decision of this court denied, with leave to the respondents making said motions to answer the petition of the petitioners within 20 days from said date if they should be so advised; and on the same day the motions made for a temporary injunction were granted and an order entered suspending the order of the Interstate Commerce Commission complained of until the further order of the court.

On June 12, 1911, the Federal Sugar Refining Company and the Interstate Commerce Commission prayed an appeal to the Supreme Court of the United States from the order or decree of the Commerce Court rendered on May 22, 1911, and assigned as one 195 of the errors committed by this court that it erred in not dismissing the petition for want of equity. The appeal prayed for was allowed by this court on June 13, 1911. On June 16, 1911, the United States prayed an appeal to the Supreme Court of the United States from the order or decree of this court entered May 22, 1911, and assigned as error, among others, that the Commerce Court erred in not sustaining the motion of the United States to dismiss the petition and the intervening petitions. The appeal prayed for was granted by this court on the same day. On June 10, 1912, the Supreme Court of the United States affirmed the decree of this court entered May 22, 1911.

On June 9, 1911, the Federal Sugar Refining Company filed its answer to the original petition; and on the same day the United States filed its answer to the original petition and also to the intervening petitions of Arbuckle Brothers and Brooklyn Eastern District Terminal. The Interstate Commerce Commission has never answered either of the petitions.

The mandate of the Supreme Court was filed in this court on June 24, 1912. On October 10, 1912, the United States and the Federal Sugar Refining Company, upon leave granted by the court, withdrew their several answers, and on the same day filed their motion to dismiss the petition of the petitioners for the reason that the facts set forth in said petition did not constitute a cause of action or entitle said petitioners to the relief or any of the relief 196 asked for by them in and by said petition. This action of

the United States and the Federal Sugar Refining Company left the case standing upon the petitions of the petitioners and the intervening petitioners and the motions to dismiss of the respondent, and intervening respondents Federal Sugar Refining Company and Interstate Commerce Commission. In this condition of the case the parties, by their counsel, appeared in open court and stipulated that the case be submitted to the court for final decision upon the merits on the petitions and motions to dismiss.

The material facts as they appear in the petitions are as follows:

The petitioning railroads are engaged in the transportation of passengers and property by railroad from one State to another, and all have rail termini upon the New Jersey shore of the harbor of New York, except the Baltimore and Ohio Railroad Company, whose rail terminus is at St. George, Staten Island, and the Pennsylvania Railroad Company, whose rail terminus for passenger traffic only is in the Borough of Manhattan. In order to reach the shipping territory of Greater New York across the Hudson and East Rivers and other waters, petitioners have been compelled to serve the vast shipping interests of Greater New York by means of floats, lighters, and

197 barges. Petitioners have established a lighterage zone, known as the lighterage limits, which has been in effect for several years, and during that time has been and is now described in the tariffs of each of said petitioners, which tariffs have been and are duly filed with the Interstate Commerce Commission, as follows:

"North River: New York side, Battery to 135th Street; New Jersey side, Jersey City, N. J., to and including Fort Lee, N. J.

"East River and Harlem River: New York side, Battery to Jerome Avenue Bridge, including Harlem River side of Wards and Randalls Islands. Brooklyn side, from Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal west of Washington Avenue Bridge, and to Hamilton Avenue Bridge, Gowanus Canal, to and including 69th Street, South Brooklyn (Bay Ridge).

"New York Bay: Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and include Shooter Island; points on the New Jersey shore of New York Bay and on the Kill von Kull, between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, Staten Island."

Within said lighterage limits petitioners perform, without additional charge, a lighterage service on eastbound shipments from their rail terminals upon the western shore of New York Harbor to points within those limits, and on westbound shipments from points within those limits to their rail terminals upon the western shore of New York Harbor.

198 Within said lighterage limits and at various points within the Boroughs of Manhattan and Brooklyn, city of New York, each petitioner has established and for several years has maintained, and still maintains, freight terminal stations, at which it delivers eastbound freight and receives westbound freight for transportation over its lines. Each petitioner has some freight terminal stations, as aforesaid, which it owns and directly operates, and others which are operated for it under and pursuant to the provisions of certain contracts between it and the owners of said terminal stations. In some instances a single terminal station is operated for and on behalf of two or more of said petitioners under and pursuant to certain contracts between them and the owner of said station, and in such instances said terminal station is a union terminal for two or more of said petitioners. It is impossible for petitioners to deliver and receive all freight, especially carload freight, at said terminals. A large part of it must of necessity be delivered and received at public and private docks within the said lighterage limits. Accordingly, petitioners have for several years received and delivered freight at all steamship piers, docks, and landings, and private piers or landings when shippers or consignees arrange for the receipt or delivery of freight within the lighterage limits, and have lightered it without additional charge from and to said points, and still do so receive, deliver, and lighter it. Petitioners transport between said

199 terminal stations, piers, docks, and landings and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the point of destination, and for the flat New York rate, by means of lighters, floats, and barges owned and directly operated by them, or operated for them under contracts between them and the owners of such equipment, freight received at or destined to said terminal stations, piers, docks, and landings.

Petitioners for several years past have held and now hold themselves out as common carriers to and from all said points within the lighterage limits, both by their practice of receiving and delivering freight at said points and by their tariffs, which are now and for several years past have been duly published and filed with the Interstate Commerce Commission. The liability under their respective bills of lading attaches to petitioners on westbound shipments from the time the freight is received at such terminal station, dock, pier, or landing and ends on eastbound shipments when delivered into the hands of the consignee at such terminal station, dock, pier, or landing. The bill of lading issued by petitioners for freight so received or delivered by them by its terms covers and includes the lighterage movement.

Among other terminal freight stations established by petitioners within the said lighterage limits is the Jay Street Terminal. 200 This terminal is located at the foot of Bridge Street, Brooklyn, on the East River, having a water frontage of 1,200 feet and a depth of 600 feet. Its equipment consists of a large freight house, two Baldwin locomotives, three tug boats, two steam lighters, eleven barges, and nine car floats. The capacity of the yard is about 235 cars. The Jay Street Terminal is a union freight terminal for all of said petitioners and is designated as a regular public freight terminal of petitioners in their tariffs filed with the Interstate Commerce Commission. It is owned by a copartnership composed of William A. Jamison and John Arbuckle, conducting such freight terminal as a separate business under the name and style of Jay Street Terminal, under certificate filed with the clerk of New York County in accordance with the law of the State of New York, and is operated as a freight station for petitioners under and pursuant to several contracts between petitioners and the Jay Street Terminal, which contracts are substantially identical in their terms and provisions. The material parts of one of said contracts and representative of them all, appears in the margin.¹

¹This agreement, made the fifth day of February, A. D. one thousand nine hundred and six, by and between Jay Street Terminal (hereinafter called Terminal Company), party of the first part, and Erie Railroad Company, party of the second part, witnesseth:

Whereas the Terminal Company is the owner of premises in the borough of Brooklyn, city of New York, lying along and contiguous to the East River at a point east of Catherine Ferry, so called, and west of the United States navy yard, upon which there are now erected, or in process of erection, certain warehouses, bulkheads, docks, and piers, railway tracks, and sidings, equipped or about to be equipped with suitable float bridges and approaches, and the usual appurtenances for receiving, handling, and delivering freights and for trans-

201 The Jay Street Terminal serves the shippers of a large and important manufacturing and shipping territory, including about one-third of the densely populated part of Brooklyn. It is the only convenient and accessible freight station of petitioners for the shippers of that territory. When it became necessary several years ago for petitioners to establish and operate public freight terminals for the service of said territory, they had no choice but to enter 202 into a contractual arrangement with the owner of the Jay Street Terminal for the operation of said terminal as a public freight station of petitioners. The price of the water front property in that section was so high as to be prohibitive. No independent terminals other than the Jay Street Terminal were conveniently accessible to the shippers of that territory. In no other practicable way could petitioners in the past, nor can they at present, serve the large and important shipping interests of this section of Brooklyn 203 than by the maintenance of the Jay Street Terminal as a public freight station of petitioners under and pursuant to said contracts.

Arbuckle and Jamison operate a sugar refinery in the borough of Brooklyn, located upwards of a block from the Jay Street Terminal. Shipments are carted from and to the terminal by Arbuckle and Jamison and handled at the terminal in the same way as the freight of hundreds of other shippers, and the freight charges 204 thereon are collected from said Arbuckle and Jamison by the Jay Street Terminal in accordance with the regularly published tariffs of petitioners. Approximately four-fifths of the

porting same between said premises and the freight station of said Railroad Company located at Jersey City, N. J.; and

Whereas the said Terminal Company is engaged in and will continue in the business of receiving freights at its said premises and carrying the same in both directions between its said premises and the said station of said Railroad Company and other carriers; and

Whereas the said Railroad Company desires to avail itself of the facilities, conveniences, and services of the said Terminal Company in the transportation of freights in both directions between the said premises of said Terminal Company and the aforesaid freight station of the said Railroad Company;

Now, therefore, in consideration of the mutual covenants, promises, and agreements herein contained, the said parties do hereby covenant, promise and agree to and with each other as follows:

First. The said Terminal Company will put and maintain its premises in good order and condition for the reception and delivery of such freights, and will provide tugboats, car floats, docks, piers, float bridges, and approaches adequate at all times to receive, discharge, transfer, and deliver such freights loaded or to be loaded in cars under this contract, and sufficient to accommodate the amount of business hereunder contemplated.

Second. Said Terminal Company will receive at the said float bridges of said Railroad Company at its aforesaid freight station, in cars to be placed upon its floats by said Railroad Company, all freights intended for delivery at the aforesaid premises of the said Terminal Company, and will safely carry the same to its said premises, and there make delivery thereof to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of said Railroad Company and carry and deliver the same to said Railroad Company upon said Terminal Company's floats at the float bridges of said Railroad Company at its aforesaid freight station.

Third. The responsibility of said Terminal Company for eastwardly bound cars and the freight therein shall begin when the cars are placed upon its floats

shipments of sugar made by Arbuckle and Jamison through said Jay Street Terminal are sold by said Arbuckle and Jamison f. o. b. Brooklyn and become the property of the consignees immediately upon delivery to the terminal. During the first six months of 1907 the bills of lading issued by the Jay Street Terminal for 205 shipments of general merchandise numbered 92,622, of which 3,969 were for Arbuckle and Jamison sugar and 1,210 for Arbuckle and Jamison coffee, and the shipments and receipts of said Arbuckle and Jamison constituted less than one-third of the total tonnage moving through the terminal. During the same period the number of different consignees who received freight at the terminal was about 765, and the number of different shippers through the terminal about 560. The profits in the operation of the Jay

(b) For freight originating at or destined to any of the said western termini or points east thereof, or billed to or from said western termini at local rates, the allowance to said Terminal Company shall be three (3) cents per hundred pounds, whether or not the traffic reaches the terminal point through any other of said termini, it being understood that the western terminal points referred to are as follows: Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Salamanca, Erie, Pittsburgh, Allegheny, Bellaire, Wheeling, Parkersburg, Dunkirk.

(c) For "not to be graded" grain in bulk, for track delivery in the borough of Brooklyn, the rate shall be three cents per hundred pounds.

(d) For freight which is rated per gross ton, either in official classification or in commodity tariffs, the allowance shall be three cents, or four and one-fifth cents per hundred pounds, regardless of the gross-ton rating.

* * * * *
Eleventh. Said Railroad Company agrees that during the continuance of this agreement the same rates of freight shall prevail from and to the premises

at the said float bridges at the aforesaid station of said Railroad Company, and shall continue as respects the cars until they have been returned by it, loaded or empty; and as respects the freights contained in eastwardly bound cars, its responsibility shall continue until the actual delivery thereof to and acceptance by the consignees at Brooklyn. As respects the freights to be transported west bound, said Terminal Company's responsibility shall commence at the time the same is received from the consignor at its aforesaid premises, and shall continue until said freights, loaded into cars, have been brought to the float bridge of said Railroad Company at its aforesaid freight station and until the floats have been attached to the float bridge, and the cars are in complete readiness for removal from the car floats by said Railroad Company.

Fifth. The Railroad Company agrees to construct and maintain all necessary tracks, float bridges, approaches, and appurtenances at its said freight station to adequately carry out the purpose of this agreement.

Sixth. Said Railroad Company will pay said Terminal Company in full for all its services under this contract, as well as in full compensation for all responsibility to be undertaken by it in respect to cars and freight, as follows:

(a) For all freights transported over said Railroad Company's railroad which shall have been received from its connecting lines west of Trunk Line western termini, on through rates, or for freight received by the said Terminal Company at its aforesaid premises and destined for transportation by said Railroad Company to points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth (4 $\frac{1}{5}$) cents per hundred pounds. It is agreed, however, that whenever the allowance to Palmers Dock on east bound or west bound rail-and-lake traffic or both is reduced from four and one-fifth (4 $\frac{1}{5}$) cents to three (3) cents per hundred pounds the same reduction shall be made in the allowance to Jay Street Terminal on rail-and-lake traffic. And it is also agreed that whenever the allowance for like service on such traffic to said Palmers Dock or any other Brooklyn terminal is increased above the rates herein specified the same increase shall be made in the allowance to said Jay Street Terminal on such traffic.

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of said terminal company that prevail from and to the regular freight stations of said Railroad Company in the borough of Manhattan, city of New York, excepting when coming from or going to points east of Susquehanna, in which case floatage shall be added in both directions, to which the Railroad Company shall be entitled.

Twelfth. Said Terminal Company will be responsible for and pay to said Railroad Company all freight moneys and charges as set forth in freight bills rendered by said Railroad Company for the transportation of eastbound freights delivered to it, and in like manner shall be responsible for and pay to said Railroad Company all moneys and charges which have been made payable in advance on westbound freights, all of which payments shall be turned over to said Railroad Company in accordance with the latter's customary rules; and, if so required, the customary guaranteed bond shall be furnished by the said Terminal Company.

Thirteenth. Said Railroad Company will provide sufficient cars at all times for receiving and taking away the freights hereunder contemplated (unavoidable delay excepted), and to supply all the railway books and blanks necessary for the purpose of the business to be carried on under this contract, and with all reasonable dispatch to receive and take away from the said float bridges at its aforesaid station all the westbound freights intended for transportation over its own lines and its connections.

Fourteenth. Said Terminal Company will insure and keep insured against loss by fire and marine risks all freights, cars, and property received by it upon its floats or its said premises under this contract so long as said freights, cars, or property shall remain in its possession, and until delivered to the consignee or to said Railroad Company as hereinbefore provided, including the time such freights, cars, or property shall be upon its lighterage line; and such insurance shall be for the benefit of said Railroad Company and others as their respective interests shall appear, and to an amount and in such manner as shall be satisfactory to said Railroad Company.

Fifteenth. Said Railroad Company will not during the continuance of this agreement, unless legally compelled to do so, establish or maintain any freight stations within the limits of said borough of Brooklyn between said Catherine Ferry and said United States navy yard. In case of any breach of this condition said Terminal Company may recover from said Railroad Company, and the latter shall pay to said Terminal Company, damages at the rate of three dollars for each and every carload, averaged at twenty thousand pounds, received or delivered or transported contrary to this provision.

Sixteenth. In case any eastbound freight consigned to stations of said Railroad Company in said city of New York other than the premises of said Terminal Company shall have its destination changed to the premises of the said Terminal Company and be delivered therat, said Terminal Company will, at the request of said Railroad Company, collect from the consignee or forwarder the sum of three (3) cents per hundred pounds and such three cents per hundred pounds shall be retained by said Terminal Company as full compensation for all services performed by it in such cases, and no other allowance shall be made under this contract in such case.

Seventeenth. Said Terminal Company will furnish said Railroad Company with a complete and accurate copy of each and all contracts made by it with other railroad companies during the term of this contract, and the Erie Railroad Company shall have and enjoy during the life of this contract all rights and privileges granted to any other railroad by said Terminal Company upon as favorable terms, with respect to allowances or otherwise, as granted to any other railroad company, anything herein to the contrary notwithstanding.

Eighteenth. This contract shall become operative and go into effect on the fifteenth day of February, 1906, and shall continue in force until March thirty-first, 1910; thereafter subject to termination upon ninety days' notice by either party.

206 Street Terminal on all shipments during the same period amounted to less than 3 per cent on the investment, without making any allowances for depreciation or interest.

The Federal Sugar Refining Company is a corporation of the State of New York, having its executive offices at 138 Front Street, in the borough of Manhattan, and having its refineries from which it ships

all its outbound products, including sugar, and at which it receives all its inbound supplies for the manufacture of sugar and commodities allied thereto, on the east bank of the Hudson River, within the corporate limits of the city of Yonkers, and more than ten miles distant from the northernmost boundaries of the lighterage limits of petitioners. Said refineries are located on the line of the New York Central and Hudson River Railroad Company, with which they have switch connections and over which the Federal Sugar Refining Company ships the greater part of its output and receives a large part of its inbound shipments. Over this railroad, with few exceptions, the rates to points in the shipping territory of the Federal Sugar Refining Company are the same as the rates from the Jay Street Terminal over the lines of petitioners. In order to make shipments of its sugar from Yonkers via the lines of petitioners at the New York rate the Federal Sugar Refining Company must deliver such shipments to

the New York Central and Hudson River Railroad Company at Yonkers, thence to be transported by that railroad to

207 New York, and there delivered to petitioners at points within the lighterage limits. Because of alleged delay in the handling and transportation of such shipments via the route aforesaid, the Federal Sugar Refining Company prefers to deliver said shipments directly to petitioners by lighter within the lighterage limits. Prior to July, 1909, the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, was accustomed to deliver its shipments at Yonkers to the Ben Franklin Transportation Company, which transported the same direct to the terminals of petitioners on the west shore of New York Harbor at a charge to the Federal Sugar Refining Company of Yonkers of three cents per hundred pounds.

In the month of May, 1907, the Federal Sugar Refining Company of Yonkers filed a complaint with the Interstate Commerce Commission against petitioners, alleging that the complainant, through the Ben Franklin Transportation Company, performed the same service on its shipments of sugar as were said to be performed by the Brooklyn Eastern District Terminal on shipments of the American Sugar Refining Company and by the Jay Street Terminal on shipments of Arbuckle and Jamison; that the lighterage limits prescribed by petitioners were unduly discriminatory in that they did not extend

208 to Yonkers and include the refinery of the Federal Sugar Refining Company of Yonkers, and permitted allowances to be made on shipments of sugar from the refineries of Arbuckle and Jamison and the American Sugar Refining Company, while not so permitting on the complainant's shipments, because the latter was located outside the prescribed limits. This practice was said to result in unjust discrimination and to oblige complainant to pay unreasonable rates. Said complaint was answered by petitioners, and after due hearing and consideration, the Interstate Commerce Commission dismissed said complaint because the extension of petitioners' lighterage limits in New York Harbor was a matter of business discretion

and said commission had no authority to require such extension beyond the then prescribed boundaries, and complainant, being located outside of the prescribed lighterage limits, was not subjected to unlawful discrimination by reason of the practice of petitioners in affording free lighterage on shipments originating at or destined to points within said lighterage limits, while refusing to so afford on complainants' shipments.

As a device to appear to ship from within the lighterage limits, within a month after the decision of the Interstate Commerce Commission above mentioned, a new corporation known as the "Federal Sugar Refining Company," was organized, which established its

209 principal office at 138 Front Street, New York City, and took over the refineries heretofore mentioned, in the city of Yonkers,

and adopted the following practice: Contracts of sale or orders for sugar were received at 138 Front Street, and each of said orders was given a separate contract number, and said order bearing the contract number was forwarded to the refinery, where the order was filled and the barrels or bags were stamped with the contract number and placed on a lighter. The shipment bearing the contract number remained intact until it reached the hands of the buyer. The refinery received shipping instructions from 138 Front Street, and these shipping instructions showed the contract number, the ultimate destination, and the rail line over which the shipment was to be transported. The captain of the lighter of the Ben Franklin Transportation Company gave a receipt to the refinery and received from the refinery a so-called bill of lading, which was a form of railroad bill of lading filled in by the Federal Sugar Refining Company, and designating a consignment to the Federal Sugar Refining Company, 138 Front Street, New York City, to be transported by the Ben Franklin Transportation Company and showing the contract number with which the shipment had been marked. This alleged bill of lading was not signed by the Ben Franklin Transportation Company through any of its officers or the captain of the lighter or

210 by any other carrier. There was nothing in any of the documents which called for transportation to Pier 24, North River.

The said shipping instructions sent from 138 Front Street to Yonkers were to ship to "Federal Sugar Refining Company, 138 Front Street, City, B. F. T. Co. (B. & O.)," or other initials representing the Ben Franklin Transportation Company and one of petitioners, as the case might be. None of the petitioners could or did perform any transportation service in connection with the Ben Franklin Transportation Company between Yonkers and 138 Front Street, and such shipping instructions were in fact directions to deliver said shipments to the Ben Franklin Transportation Company to be lightered and delivered to one of petitioners at its terminal on the west shore of New York Harbor. The practice was for the lighter of the Ben Franklin Transportation Company to go to Pier 24, North River, New York, part of which pier is leased to the Ben Franklin Transportation Company, where the captain of the lighter

called up the office of the Federal Sugar Refining Company at 138 Front Street and reported the particular shipment then on his lighter. The captain of the lighter was then handed a form of bill of lading not signed by any of petitioners and showing the name and address of the censignor as the Federal Sugar Refining Company, 138 Front Street, New York, Franklin Street Pier 21, North River. The lighter then proceeded to the rail terminus of such petitioners 211 as had been previously designated in the shipping instructions sent to Yonkers, and there delivered the shipment to such petitioner and obtained the signature of petitioner's agent at said terminus upon the form of bill of lading theretofore prepared and delivered to said captain as aforesaid, and said bill of lading was stamped by said petitioner's agent to show the receipt of the shipment at said station on the west shore of New York Harbor.

Such shipments were handled under contract between the Ben Franklin Transportation Company and the Federal Sugar Refining Company for a compensation of three cents per hundred pounds, although the contract provides for a compensation of four cents per hundred pounds on sugar lightered from Yonkers to Pier 21, North River, payments for said service being made to the Ben Franklin Transportation Company under that provision of said contract which provides for a compensation of three cents per hundred pounds for sugar lightered from Yonkers to petitioners' rail termini.

Having established the practice above described, the said Federal Sugar Refining Company filed a complaint in October, 1909, with the Interstate Commerce Commission against petitioners. Said complaint alleged, in substance, that the interstate transportation of the product of the said Federal Sugar Refining Company began at Pier 21, North River, Borough of Manhattan, a point 212 within the lighterage limits as aforesaid, and that said Jay

Street Terminal is owned and conducted by copartners, named John Arbuckle and William A. Jamison, which said copartners owned, maintained, and operated in connection therewith a sugar refinery at the foot of Jay Street, Borough of Brooklyn; that said amounts of three cents per hundred pounds and four and one-fifth cents per hundred pounds were paid to said copartners for the lighterage of their sugar from Jay Street, Brooklyn, to the rail termini of petitioners on the west bank of New York Harbor, and that inasmuch as the said Federal Sugar Refining Company was a competitor of the said Arbuckle and Jamison in the sugar business, it constituted an undue and unreasonable prejudice and disadvantage against said Federal Sugar Refining Company to pay said amounts of three cents and four and one-fifth cents per hundred pounds for the handling of sugar to said Arbuckle and Jamison, and not to pay similarly to the said Federal Sugar Refining Company. Hearings were had before the Interstate Commerce Commission upon the last-mentioned complaint, and subsequently the commission issued its order against petitioners in the following language:

"It is ordered that the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years 213 thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the commission in said report to be unduly discriminatory and in violation of the act to regulate commerce."

The leave granted by this court allowing the United States and the Federal Sugar Refining Company to withdraw their answers and file motion to dismiss undoubtedly entitles them to be again heard as to whether the petition states a cause of action, although the record thus presented is a novel one. We certainly are in no position, after having denied the motions to dismiss and after the Supreme Court has affirmed our action so far as the granting of the temporary injunction is concerned, to now hold upon the same facts that the petitions do not state facts sufficient to constitute a cause of action, merely because the case is now submitted for final decision. We are of the same opinion, however, as when we denied the motions to dismiss on May 22, 1911, but as we did not at that time give the reasons which impelled us to make the decision then rendered, we can now with propriety state them.

The Interstate Commerce Commission in its report and order did not specify whether it found a violation of section 2 or section 3 of the act to regulate commerce. These sections read as follows:

214 "Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

The language used by the commission would lead to the inference that it found a violation of section 3. If the facts pleaded, however, show a violation of either of the above sections, the order must be

sustained, and it must also be sustained if based upon a finding of fact, which we are not at liberty to review. In the 215 first place, the case must be freed from matters which cloud the real issue. It is continually suggested that the arrangement between petitioners and the Jay Street Terminal may be a scheme to cover a rebate. We are not permitted to base our judgment on suspicion, but upon facts pleaded and proven. Respondents have been given ample opportunity to produce all evidence within their power for the purpose of showing that the payments made by petitioners to the Jay Street Terminal constitute unlawful rebates, but no such evidence has been produced. On the contrary, respondents withdrew their answers and now ask the court to decide the case upon the facts stated in the petition. Surely upon this record the court ought to be relieved of presuming that the contracts made by petitioners with the Jay Street Terminal are a cover for the payment of unlawful rebates.

Again, the performance of the Ben Franklin Transportation Company at Pier 24, North River, is a play in which the episode is lost in the dénouement. It is a plain device and subterfuge indulged in on behalf of the Federal Sugar Refining Company for the purpose of making it seem that sugar which is being lightered from Yonkers, New York, ten miles north of the lighterage limits established by petitioners, was in fact shipped from Pier 24 by a delivery of the same at that point to the petitioners, when the uncontradicted record, as admitted by the motions to dismiss, shows that the 216 petitioners have nothing to do with the sugar of the Federal

Sugar Refining Company until it reaches the New Jersey shore and is there delivered to petitioners. Courts of equity looking through mere forms to the substance of things can not, nor ought they be asked to, found their judgment upon a plain subterfuge. No sugar is tendered by the Federal Sugar Refining Company to petitioners at Pier 24. On the contrary, the Ben Franklin Transportation Company, acting for the Federal Sugar Refining Company, refuses to tender it there and allow it to be taken by petitioners, but insists upon transporting it itself to the rail termini. The statement of facts makes it plain that the Federal Sugar Refining Company transports its sugar direct from Yonkers to the Jersey shore, and we must find as a matter of law that the transportation of Federal sugar by petitioners does not commence until it is delivered to them at their rail termini. The facts do not bring the case within the ruling of the Supreme Court in *Gulf, Colorado and Santa Fe Railway Company v. Texas* (204 U. S., 403).

We must indulge in the presumption that the commission found nothing unlawful in the payments made by petitioners to the Jay Street Terminal under the facts appearing in the record, or it would not have framed its order in the alternative. *Penn Refining Co. v. W. N. Y. & P. R. R. Co.*, 208 U. S., 208; *East Tenn. etc., R. R. Co. v. Interstate Commerce Commission*, 181 U. S., 1; *Interstate Commerce Commission v. Louisville & Nashville R. R.*

Co., 190 U. S., 273; Louisville & Nashville R. R. Co. v. United States, 197 Fed., 58-60.)

There can be no doubt as a matter of law under the facts admitted that transportation by petitioners of freight delivered to them at the Jay Street Terminal commences at said terminal, and that the services performed by the Jay Street Terminal are transportation services. In our disposition of the case we make no distinction between the Jay Street Terminal and Arbuckle Brothers, but treat them as the same entity in legal effect. It then appears that petitioners under their respective contracts are paying the Jay Street Terminal for a terminal service and also for the transportation of freight from the terminal to the Jersey shore. Providing this charge is reasonable, and there is no suggestion that it is not, we understand the law to permit such payment. (Central Stock Yards Co. v. L. & N. Railway Co., 192 U. S., 568; R. R. Com. of Ky. v. L. & N. Railway Co., 10 L. C. C. Rep., 173; Cattle Raisers Ass'n v. C. B. & Q. R. R. Co., 11 L. C. C. Rep., 277; see, 15, act to regulate commerce, as amended; Central Stock Yards Co. v. L. & N. Ry. Co., 118 Fed., 113; 218 affirmed, 193 U. S., 568; Covington Stock Yds. Co. v. Keith, 139 U. S., 128; Butchers & G. Stock Yds. Co. v. L. & N. R. R. Co., 66 Fed., 35; United States v. Delaware, L. & W. Co., 40 Fed., 101; Consolidating Fordg. Co. v. Southern T. Co. et al., 9 L. C. C. Rep., 182; Excursion Car Co. v. Penn. R. Co., 3 L. C. C. Rep., 577; In re Transportation of Fruit, 10 L. C. C. Rep., 360; F. H. Peavey Co. v. Union Pac. R. Co., 176 Fed., 409; affirmed, 222 U. S., 42; Interstate Commerce Commission v. Difffenbaugh, 222 U. S., 42.)

This case is in no way parallel to the case of Union Pacific Railway Company v. Updyke (222 U. S., 15). The Jay Street Terminal is one of the public terminals of petitioners, and it is owned by Arbuckle Brothers. The payments made by petitioners to the Jay Street Terminal are for the terminal and transportation services performed by it in connection with all freight shipped from or delivered to said Jay Street Terminal. It so happens that Arbuckle Brothers, who own and operate the terminal, also are shippers, and only in this way can it be said that they receive payment for transporting their own sugar. In order to make the case parallel to the Updyke case, it would have to appear that the Federal Sugar Refining Company also owned and operated for petitioners a public terminal for the receipt and delivery of freight within the lighterage limits, and that the Federal Sugar Refining Company had sugar of its own which it transported to the rails of petitioners together with other freight. If the case stood in such position, under the Updyke case it might be necessary to hold that the petitioners must make the same payments to the Federal Sugar Refining Company as to Jay Street Terminal. But the always-present fact is that the Federal Sugar Refining Company does not own and operate any public terminal for petitioners, nor does it transport a pound of sugar from any terminal within the lighterage limits to the rail terminal of petitioners. There is no room for the court to enforce equality between

Arbuckle Brothers and the Federal Sugar Refining Company as to payments for the transportation of their sugar, for the reason that the position in which the court finds the respective parties to the controversy will not permit. We find Arbuckle Brothers owning the Jay Street Terminal, used as a public terminal of petitioners within the lighterage limits. We find the Federal Sugar Refining Company, with its refinery at Yonkers, ten miles north of the lighterage limits, owning and operating no public terminal for petitioners and tendering petitioners no freight at any of their public terminals. So that we can not see how any violation of either section 2 or section 3 can be predicated of the facts stated in the record.

220 But it is claimed that this is true: That it costs the Federal Sugar Refining Company three cents per hundred pounds more to get its sugar to the Jersey shore than it does Arbuckle Brothers. This could be avoided in part if the Federal Sugar Refining Company would tender its sugar for shipment over the rails of petitioners at any of the terminals of petitioners within the lighterage limits, many of which are much nearer Yonkers than the Jay Street Terminal or even Pier 24, North River. And we must not forget in this connection that the Federal Sugar Refining Company voluntarily located its refinery at Yonkers, and if it thereby has subjected itself to some natural disadvantage it can not call upon the courts to remedy it. The commission recognized this fact when it refused to compel petitioners to extend their lighterage limits so as to include the Federal sugar refinery. It is apparent from the record that the sole disadvantage of the Federal Sugar Refining Company results from its location outside the lighterage limits, and that it is in no way injured or prejudiced by the fact that Arbuckle Brothers own the Jay Street Terminal.

For the reasons above stated we are of the opinion that the order of the commission was in excess of its power, and that it ought to be permanently suspended and enjoined. And it is so ordered.

221 **MACK, Judge, dissenting:**

The commission in its report does not clearly indicate whether it deems the transportation of the Arbuckle sugar to begin in New York or in Jersey City. It is conceded by counsel that this is a question of law to be determined by this court. As to goods shipped by Arbuckle Brothers to others than themselves as consignees, there would seem to be no room for doubt, for whatever may be the liability of the Jay Street Terminal toward such consignees, clearly the railroad companies are liable to them as common carriers at the latest from the time of the delivery of the goods into the cars and the issuance of the bill of lading in their name by their authorized agents in New York. I concur in the conclusion of the majority of the court that this transportation begins in New York.

As to the comparatively small percentage of shipments of which Arbuckle Brothers are the consignees as well as the consignors, this would seem to be equally true. The title thereto could be transferred

by them immediately after the bills of lading are issued, and in that event the railroad companies would again clearly be liable as carriers to the assignees, even though the goods had not yet actually moved from New York. And the retention of title thereto by Arbuckle Brothers during the time that they, acting as agents for the railroad companies, are transporting them to Jersey City under the contract by which they agree to indemnify the railroad companies against their own acts, and thereby to release them, in a sense, from the obligations which they would ordinarily incur as common carriers toward the owner of goods carried, would not of itself change the transaction from a transportation service performed by the railroads through their agents, the shippers, into an accessorial service performed by the shippers solely on their own account, payment for which would be illegal, irrespective of any unjust discrimination that might result therefrom.

I concur, too, in the opinion of the majority of the court that Arbuckle Brothers and the Jay Street Terminal are to be treated as identical. When two individuals form two firms in which each is interested in the same proportions, the one to refine sugar, the other to operate a terminal station and to transport goods for railroads, the two firms do not thereby become so distinct and separate for every purpose as to legalize a payment to the latter firm for carrying the former's product, if such payment would be illegal as unjustly discriminatory when made directly to the former firm. The commission was therefore fully justified in this case in dealing with the two firms as one.

The question before this court then is, Could the commission reasonably find that payment to Arbuckle Brothers for getting sugar manufactured by them from a point within the lighterage limits to Jersey City, that is, for performing a part of the railroads' transportation service (a payment permitted by section 15 of the act, subject to regulation by the commission as to its reasonableness), would operate as an unjust discrimination against the Federal Sugar Refining Co. unless a similar payment were made to the latter company for getting sugar manufactured by it from another point within the lighterage limits to Jersey City?

If the Federal Company had its refinery at Pier 24, and if Arbuckle Brothers operated their wharf only as a private and not as a public station, and if the allowance made to them for carrying their sugar to Jersey City were no more than the bare cost of the service, the commission would be justified in finding that a refusal to make a similar allowance to the Federal Company and the offer to give it in lieu thereof free lighterage of its sugar would result in an unjust discrimination against the Federal Company. (Union Pacific Railroad Company v. Updike Grain Company, 222 U. S. 215.)

Do the facts, first, that the Federal Company's refinery is at Yonkers, that it brings its goods to Pier 24 primarily or solely to

get them within the lighterage limits, that it has never demanded and does not want free lighterage from Pier 24, and that as a result thereof the transportation of its goods by the railroads begins in Jersey City; or, second, that Arbuckle Brothers are employed 224 by the carriers to operate their wharf as a public terminal station, and to transport therefrom to Jersey City not only their own but others' goods, necessarily render the circumstances such that the commission in the reasonable exercise of its powers could not find them to be substantially similar?

(1) If this case were based on the grant of free lighterage to Arbuckle Brothers and the failure to grant it to the Federal Company, the latter would, of course, have no ground for complaint unless it really wanted and offered to avail itself of such free lighterage. But when, as here, the complaint is based on the grant to the one and the denial to the other of the privilege, not of free lighterage, but of itself performing for compensation the transportation service from within the lighterage limits to Jersey City, it is no answer to assert that at present the situation of the two parties is not similar, transportation for the one beginning at New York and for the other at Jersey City. The charge is that this dissimilarity is due not to the voluntary act of the parties but to the very discrimination sought to be removed as unjust, and that if the same privilege were granted the Federal Company as is granted Arbuckle Brothers—that is, to transport its goods from a point in the lighterage limits to Jersey City in its own or hired lighters, not at its cost, but as the compensated agent 225 of the railroads, it would be ready, willing, and able so to do.

If this court must find that there is no substantial basis for the commission's view that the Federal Company was shipping, and, on a grant of like privileges to those accorded Arbuckle Brothers, would be ready to ship from Pier 24, if the facts stated in the petition necessarily lead to the conclusion that the shipment is and would be direct from Yonkers, a point without, and not from Pier 24, a point within the lighterage limits, to Jersey City, there would 226 be an end of the case. I am of the opinion, however, that this court should not so hold.

The railroads are not concerned with the history of goods offered for transportation. (Interstate Commerce Commission v. D. L. & W. R. Co., 220 U. S., 235.) If parties are ready to perform for compensation that part of the service which the railroad companies, by their offer to begin the carriage in New York instead of in New Jersey, have made transportation service, it can not be material to the railroads how the goods get to the point where this service is to begin—whether it be by rail, barge, or wagon. The goods are to be tendered to them at that point. The only transportation with which we are here concerned, that by the railroads, is to begin there.

The barge that brings the Federal Company's sugar from Yonkers is tied up to the dock at Pier 24. The sugar is then just as much within the lighterage limits as if it were dumped out on the 226 pier. When the barge is so tied up, a shipper who wants to avail himself of the free-lighterage offer could assuredly do so.

The railroads make this offer to the Federal Company now, an offer which would be illegal if the goods could not be considered to be within the lighterage limits and if the interstate transportation necessarily began at Yonkers. If the refinery were situated in New York City, a few blocks off the water front on a small canal or creek large enough only for rowboats, the company clearly could bring its goods by such a boat to the dock and put them on lighters, without first dumping them onto the dock.

Of course, at the present time, the Federal Company can not offer the goods to the railroads at Pier 24. As it does not want free lighterage, and as the railroads will not accept them at Pier 24 by issuing, through regular agents or through the Federal Company itself, acting as their agent, the necessary bills of lading, and permitting the Federal Company as their paid agent thence to transport them to Jersey City under covenants similar to those found in the Jay Street Terminal contracts, it would seem to be utterly useless for the Federal Company to do anything more than it is doing. It says: "Our sugar is at Pier 24; it is already loaded in lighters; we want bills of lading for the through transportation from this point, and we demand, for similar compensation, the privilege of performing a part of the transportation service, that between the lighterage point, Pier 24, and Jersey City, a privilege substantially similar to that which you grant Arbuckle Brothers."

In the opinion filed by the commission in the original case brought by the Federal Company, involving only the extension of the lighterage limits and based primarily on an alleged violation of section 3 of the act, importance was attached to the concession of counsel that the Federal Company would not be any better off if the Jay Street Terminal were owned by the railroad companies with the implication that in that event the allowance would be cut off and only free lighterage granted. The refinery at Yonkers would, of course, always be under the disadvantage of having to bring its goods to Pier 24.

The present proceeding, however, was brought by the Federal Company not in the capacity of a Yonkers refinery, primarily to prevent, as between localities, the undue prejudice forbidden by section 3, but in its capacity of a vendor and shipper of sugar from Pier 24, primarily to prevent as against it the unjust discrimination forbidden by section 2 of the act. Only in that capacity is it to be dealt with in this case, and therefore it is immaterial how, whence, or at what cost it gets its sugar to that pier.

(2) Can parties guilty of what would otherwise be an unjust discrimination escape the consequences of their act by combining the payment for the transportation service with payment for other work that in and of itself has no necessary connection therewith?

That Arbuckle Brothers run a public wharf as agents of the railroad companies, that their compensation is a combination of rent and wages as terminal managers and transporters, that the amount

paid per 100 pounds for sugar may be far beyond a fair payment for that particular service, and may be made so because a similar payment per 100 pounds may be far below a fair payment for similar services as to other goods, do not, in my judgment, necessarily render the circumstances surrounding the transportation of the sugar to Jersey City so dissimilar from those at Pier 24 as to justify this court in holding that the commission, in the reasonable exercise of its powers, could not find that an unjust discrimination resulted from the payment to Arbuckle Brothers and the refusal to make a similar payment to the Federal Company. If the commission could reasonably so find, its order can not be annulled merely because the members of this court might have reached a different conclusion had they been acting as commissioners.

The fact that the contracts between the Jay Street Terminal and the railroads, by which the Arbuckle private docks were made public terminal stations and these allowances were definitely fixed, 229 were made during the session of Congress which enacted the

Hepburn Act, a law which aimed more effectively to prevent certain illegal practices theretofore secretly indulged in for the benefit of large and favored shippers, and the further fact that the ultimate destination of the goods determined the rate of payment, although the services in each case were absolutely identical, lends support to the conclusions of the commission that the allowances are a mere disguise to conceal unjustly discriminatory and therefore illegal payments.

In my judgment, the petition should be dismissed for want of equity.

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Final decree.

Entered November 15, 1912.

United States Commerce Court.

BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS:

Brooklyn Eastern District Terminal, John Arbuckle and William A. Jamison, intervening petitioners.

v.

UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION, Federal Sugar Refining Company, intervening respondents.

No. 38.

FINAL DECREE.

This case, having been submitted to the court for final adjudication by stipulation of counsel in open court upon the motions to dismiss and the petitions of petitioners, was taken under advisement.

And now, on this 15th day of November, 1912, the arguments and briefs of counsel having been duly considered, it is ordered, adjudged, and decreed that the order of the Interstate Commerce Commission, dated December 5, 1910, and in the following language—

"It is ordered that the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years there-

after abstain, from paying such allowances to Arbuckle Brothers their sugar while at the same time paying no such allowances to complainant on its sugar, which said allowances so paid to the Arbuckle Brothers by said defendants are found by the commission in said report to be unduly discriminatory and in violation of the "power to regulate commerce"—

231 be, and the same is hereby, annulled and set aside and enforcement perpetually enjoined.

By the court:

MARTIN A. KNAPP,
Presiding Judge

232 *Petition for appeal.*

Filed November 25, 1912.

In the United States Commerce Court.

October session, 1912.

THE BALTIMORE & OHIO RAILROAD COMPANY AND SIX OTHER railroad companies, petitioners; John Arbuckle and William A. Jamison, doing business as Arbuckle Brothers and as Jay Street Terminal, and Brooklyn Eastern District Terminal, intervening petitioners.

No.

c

THE UNITED STATES, RESPONDENT; INTERSTATE COMMERCE Commission and Federal Sugar Refining Company, intervening respondents.

PETITION FOR APPEAL.

The United States of America, respondent; Interstate Commerce Commission and Federal Sugar Refining Company, a corporation, intervening respondents, feeling themselves aggrieved by the final order or decree of the Commerce Court entered November 15, 1912, annulling and setting aside the order of the Interstate Commerce Commission and permanently enjoining the enforcement thereof, their respective counsel, pray an appeal to the Supreme Court of the United States from the said final order or decree.

The particulars wherein the respondent and the intervening respondents consider said final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the respondent and the intervening respondents pray 233 that a transcript of the record, proceedings, and papers upon which the said final order or decree was made and entered duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEORGE W. WICKERSHAM,
Attorney General of the United States

P. J. FARRELL,
Solicitor for Interstate Commerce Commission

ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining Company

Filed November 25, 1912.

In the United States Commerce Court.

October session, 1912.

THE BALTIMORE & OHIO RAILROAD COMPANY AND SIX OTHER railroad companies, petitioners; John Arbuckle and William A. Jamison, doing business as Arbuckle Brothers and as Jay Street Terminal, and Brooklyn Eastern District Terminal, intervening petitioners.

No. 38.

v.

THE UNITED STATES, RESPONDENT; INTERSTATE COMMERCE Commission and Federal Sugar Refining Company, intervening respondents.

ASSIGNMENT OF ERRORS.

Come now the United States of America, respondent; Interstate Commerce Commission and Federal Sugar Refining Company, a corporation, intervening respondents, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered against them November 15, 1912, in the above-entitled cause.

The Commerce Court erred:

I.

In denying the respective motions of the respondent and the intervening respondents to dismiss the petition and the intervening petitions and each of them; and in not granting the said motions and each of them.

II.

In annulling and setting aside the order of the Interstate Commerce Commission of December 5, 1910, and in perpetually enjoining the enforcement thereof, for that (a) the petition and the intervening petitions do not set forth any cause of action and are insufficient to warrant the relief granted thereon; (b) nor have the said petitioners and intervening petitioners shown that there is any equity in their said petitions upon which to warrant the relief granted thereon; (c) nor have the said petitioners and intervening petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded or unreasonably exercised any power or authority conferred upon it by

the act to regulate commerce; (d) nor have the petitioners and intervening petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners and intervening petitioners protected by the Constitution of the United States or any other right over which this court may exercise jurisdiction.

III.

In holding and adjudging that the question whether the handling of the shipments of sugar of Arbuckle Brothers, from Jay Street Terminal to the Jersey shore, is such as to create a substantial dissimilarity of circumstances and conditions when compared to the handling of the shipments of sugar of Federal Sugar Refining Company, from Pier 24 to the Jersey shore, is a question of law to be determined by the court, and is not a question of fact foreclosed by the findings of the Interstate Commerce Commission.

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IV.

In holding and adjudging that, as a matter of law, the practice of the petitioners of paying allowances per one hundred pounds of three cents and four and one-fifth cents on the shipments of sugar of Arbuckle Brothers, and refusing to pay either like allowances, or any allowances, on the shipments of sugar of Federal Sugar Refining Company, does not constitute the discrimination, preference, and prejudice prohibited by the act to regulate commerce and is not foreclosed by the findings of fact of the Interstate Commerce Commission.

V.

In not holding and adjudging that the matters and things set forth and complained of in the petition and the intervening petitions were matters of fact fully heard and determined by the Interstate Commerce Commission, and that its findings with respect thereto, as set forth in its report and order, are conclusive and binding upon the court; and in substituting the judgment of the court for the judgment of the commission on the question of undue preference and unjust discrimination.

VI.

In holding and adjudging that, as a matter of law, the transportation of the sugar of Arbuckle Brothers by the petitioners begins at the Jay Street Terminal and not at the rail terminals on the Jersey shore.

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VII.

In not holding and adjudging that, as a matter of law, the petitioning carriers may not lawfully make a difference in rates because of differences in circumstances arising before the service of the carriers begins.

VIII.

In holding and adjudging that, as a matter of law, the shipments of sugar of Arbuckle Brothers are delivered to the petitioners at the Jay Street Terminal within the lighterage limits and the handling of the shipments of sugar from Jay Street Terminal to the Jersey shore by Arbuckle Brothers constitutes a part of the transportation service for which they are entitled to an allowance, but that the handling of the shipments of sugar of Federal Sugar Refining Company from Pier 24, within the lighterage limits and the delivery by it from Pier 24 to the termini of the petitioners on the Jersey shore, does not constitute a part of the transportation service, and that it is not entitled to an allowance therefor.

IX.

In holding and adjudging that, as a matter of law, the petitioners are not unduly preferring Arbuckle Brothers and are not subjecting the Federal Sugar Refining Company to any undue prejudice, in violation of the act to regulate commerce, in granting to Arbuckle Brothers the privilege of handling their shipments of sugar from the Jay Street Terminal to the rail termini on the Jersey shore and paying them an allowance therefor and in withholding a similar privilege and allowance from the Federal Sugar Refining Company, as to their shipments from Pier 24.

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X.

In holding and adjudging that, as a matter of law, the receipt and handling of freight at the Jay Street Terminal for the general public constitutes a dissimilarity of circumstances and conditions in the handling of the sugar of Arbuckle Brothers from Jay Street Terminal as compared with the handling of the sugar of Federal Sugar Refining Company from Pier 24.

XI.

In not holding and adjudging that the petitioners and the intervening petitioners, Arbuckle and Jamison, are not in court with clean hands, and have no standing in a court of equity, for in the operation of the Jay Street Terminal they are unlawfully transporting in interstate commerce sugar manufactured, produced, and otherwise dealt in by them, and in which they have an interest, direct and indirect, in violation of section 1 of the act to regulate commerce.

XII.

In holding and adjudging that, as a matter of law, by reason of the geographical location of the plant of Federal Sugar Refining Company at Yonkers, N. Y., outside the lighterage limits, it is beyond

the power of the Interstate Commerce Commission to find that an undue preference and an unjust discrimination exists, and that it is beyond the right of Federal Sugar Refining Company to complain that the petitioners are preferring Arbuckle Brothers and unjustly discriminating against it, in granting to Arbuckle Brothers the privilege of performing for an allowance a part of the transportation service and withholding from it the like privilege.

XIII.

In holding and adjudging that, as a matter of law, the petitioners as common carriers may pay Arbuckle Brothers for the transportation service of handling sugar from Jay Street Terminal to the Jersey shore, and enforce an arbitrary rule which deprives Federal Sugar Refining Company of compensation for the similar transportation service of handling sugar from Pier 24 to the Jersey shore, both points being within the lighterage limits.

239 Wherefore, the respondent and the intervening respondents pray that the said final order or decree of the Commerce Court, entered November 15, 1912, be reversed, annulled, and set aside with directions that the petition be dismissed, and for such other and further order as may be appropriate.

GEORGE W. WICKERSHAM,
Attorney General of the United States.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining Company.

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Order allowing appeal.

Entered November 25, 1912.

In the United States Commerce Court.

October session, 1912.

THE BALTIMORE & OHIO RAILROAD COMPANY AND SIX other railroad companies, petitioners; John Arbuckle and William A. Jamison, doing business as Arbuckle Brothers and as Jay Street Terminal, and Brooklyn Eastern District Terminal, intervening petitioners,

v.

THE UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION AND FEDERAL SUGAR REFINING COMPANY, intervening respondents.

No. 38.

ORDER ALLOWING APPEAL.

Be it remembered that in the above-entitled cause, on this 25th day of November, 1912, the United States of America, Interstate Commerce Commission, and Federal Sugar Refining Company, a

corporation, by their respective counsel, have made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered November 15, 1912, and having at the same time made and filed an assignment of errors, and having in all respects conformed to the statute and the rules of court in such case made and provided:

It is ordered that the appeal be, and the same is hereby, allowed as prayed; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

MARTIN A. KNAPP,
*Presiding Judge of the United States
 Commerce Court in said Cause.*

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Pracipe for record.

Filed November 25, 1912.

In the United States Commerce Court.

October session, 1912.

THE BALTIMORE & OHIO RAILROAD COMPANY AND SIX
 other railroad companies, petitioners; John Ar-
 buckle and William A. Jamison, doing business as
 Arbuckle Brothers and as Jay Street Terminal, and
 Brooklyn Eastern District Terminal, intervening
 petitioners,

v.

THE UNITED STATES, RESPONDENT; INTERSTATE COM-
 MERCY COMMISSION AND FEDERAL SUGAR REFINING
 COMPANY, intervening respondents.

No. 38.

PRACIPE FOR RECORD.

To the clerk of said court:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeal of the United States, Interstate Commerce Commission, and Federal Sugar Refining Company, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition for injunction, filed April 12, 1911.

Intervening petition of Federal Sugar Refining Company, filed April 19, 1911, and order allowing the same.

Intervening petition of Brooklyn Eastern District Terminal, filed May 11, 1911, and order allowing the intervention, entered May 17, 1911.

Motion of Interstate Commerce Commission and Federal Sugar Refining Company to dismiss, filed May 11, 1911.

Intervening petition of John Arbuckle and William A. Jamison, filed May 12, 1911, and order allowing the intervention, entered May 17, 1911.

Motion of United States to dismiss, filed May 12, 1911.
 242 Order extending the several motions of the United States and the Interstate Commerce Commission and Federal Sugar Refining Company to dismiss the petition, to cover the two intervening petitions, entered May 17, 1911.

Order denying motions to dismiss, entered May 22, 1911.

Order granting motion for temporary injunction, entered May 22, 1911.

Order granting leave to the United States and Federal Sugar Refining Company to withdraw their separate answers to the petition and the two intervening petitions and to file a motion to dismiss, October 10, 1912.

Motion to dismiss of United States and Federal Sugar Refining Company.

Final hearing, journal entries.

Opinion of the United States Commerce Court.

Final decree.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

BLACKBURN ESTERLINE,
For the United States.

(Sgd.) P. J. FARRELL,
For the Interstate Commerce Commission.

(Sgd.) ERNEST A. BIGELOW,
For the Federal Sugar Refining Company.

243 Filed November 29, 1912.

In the United States Commerce Court.

October session, 1912.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

v.

UNITED STATES ET AL.

} No. 38.

Notice of filing of praecipe.

GEORGE F. BROWNELL, Esq.

Solicitor for Seven Railroad Companies, petitioners, 50 Church Street, New York, N. Y.

H. B. CLOSSON, Esq.

Solicitor for Brooklyn Eastern District Terminal, intervening petitioners, 52 William Street, New York, N. Y.

WILLIAM N. DYKMAN, Esq.

Solicitor for John Arbuckle and William A. Jamison, doing business as Arbuckle Brothers and as Jay Street Terminal, 177 Montague Street, Brooklyn, N. Y.

You and each of you will please take notice that the United States of America, respondent, Interstate Commerce Commission and Fed-

eral Sugar Refining Company, a corporation, intervening respondents, have filed a praecipe in the office of the clerk of the United States Commerce Court in the above-entitled cause for the preparation of the record for their appeal to the Supreme Court of the United States, a true copy of which praecipe for record is herewith handed you.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

Service of a copy of the above notice, together with a copy of the said praecipe, is hereby admitted this 26th day of November, A. D. 1912.

GEO. F. BROWNELL,
Solicitor for the Seven Railroad Companies, Petitioners.

Solicitor for Brooklyn Eastern District Terminal.

DYKMAN, OELAND & KUHN,
Solicitor for Arbuckle Brothers and Jay Street Terminal.

244 SOUTHERN DISTRICT OF NEW YORK, ^{ss}:

HENRY HORN being duly sworn deposes and says that he is an employee in the office of Henry A. Wise, United States attorney for the Southern District of New York; that on the 26th day of November, 1912, at No. 52 William St., in the Borough of Manhattan, city of New York, he served a copy of the within notice of filing of praecipe upon H. B. Closson, Esq., solicitor for the Brooklyn Eastern District Terminal, intervening petitioners, by delivering said copy to the managing clerk of said solicitor, and leaving the same with him; that at the time of said service said H. B. Closson, Esq., was then absent from his office. Deponent further says that on said 26th day of November, 1912, at 177 Montague St., in the Borough of Brooklyn, city of New York, he served a copy of the within notice of filing praecipe upon William N. Dykman, Esq., solicitor for John Arbuckle and William A. Jamison, doing business as Arbuckle Brothers, and as Jay Street Terminal, by delivering said copy to the managing clerk of said William N. Dykman, Esq., and leaving the same with him; that at the time of said service said William N. Dykman was then absent from his office. Deponent further says that he is over the age of 18 years.

HENRY HORN.

Sworn to before me this 26th day of November, 1912.

FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

[NOTARIAL SEAL.]

BALTIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; ERIC RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY, PETITIONERS; BROOKLYN EASTERN DISTRICT TERMINAL, JOHN ARBUCKLE AND WILLIAM A. JAMISON, INTERVENING PETITIONERS,

vs.

UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION; FEDERAL SUGAR REFINING COMPANY, INTERVENING RESPONDENTS.

UNITED STATES OF AMERICA, *ss*:

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 244 inclusive) to be a true and complete transcript of the proceedings had and papers filed in the above entitled cause, made in accordance with the practice filed in the office of the clerk of said court of the 25th day of November, 1912, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 29th day of November, A. D. 1912.

[SEAL.]

G. F. SNYDER, Clerk.

Citation on appeal.

UNITED STATES OF AMERICA, *ss*:

To The Baltimore & Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Eric Railroad Company; Lehigh Valley Railroad Company; New York, Ontario & Western Railway Company; The Pennsylvania Railroad Company; John Arbuckle and William A. Jamison, doing business as Arbuckle Brothers and as Jay Street Terminal; Brooklyn Eastern District Terminal, greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the office of the clerk of the United States Commerce Court, Washington, District of Columbia, wherein the United States of America, Interstate Commerce Commission, and Federal Sugar Refining Company are appellants, and you are appellees, to show cause, if any there be, why the order or decree of the United States Commerce Court against the said appellants as in the said petition of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Martin A. Knapp, presiding judge of the United States Commerce Court in said cause, this 25th day of November, A. D. 1912.

MARTIN A. KNAPP,
*Presiding Judge of the United States
 Commerce Court in said cause.*

Attest:

[SEAL]

G. F. SNYDER,
Clerk United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 26th day of November, A. D. 1912.

GEO. F. BROWNELL,
Solicitors for the Seven Railroad Companies, as Appellee.

— — — — —
Solicitor for Brooklyn Eastern District Terminal.

DYKMAN, ORLAND & KUHN,
Solicitor for Arbuckle Brothers and Jay Street Terminal.

247 SOUTHERN DISTRICT OF NEW YORK: ss;

HENRY HORN, being duly sworn, deposes and says that he is an employee in the office of Henry A. Wise, United States attorney for the Southern District of New York; that on the 26th day of November, 1912, at No. 52 William St., in the Borough of Manhattan, city of New York, he served a copy of the within citation upon H. B. Closson, Esq., solicitor for the Brooklyn Eastern District Terminal, intervening petitioners, by delivering said copy to the managing clerk of said solicitor, and leaving the same with him; that at the time of said service said H. B. Closson, Esq., was then absent from his office. Deponent further says that on said 26th day of November, 1912, at 177 Montague St., in the Borough of Brooklyn, city of New York, he served a copy of the within citation upon William N. Dykman, Esq., solicitor for John Arbuckle and William A. Jamison, doing business as Arbuckle Brothers, and as Jay Street Terminal, by delivering said copy to the managing clerk of said William N. Dykman, Esq., and leaving the same with him; that at the time of said service said William N. Dykman was then absent from his office. Deponent further says that he is over the age of 18 years.

HENRY HORN.

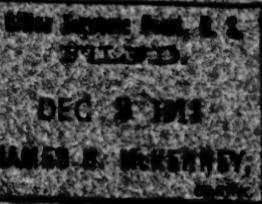
Sworn to before me this 26th day of November, 1912.

FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Indorsement on cover:) File No. 23437. United States Commerce Court. Term No. 862. The United States, Interstate Commerce Commission, and Federal Sugar Refining Company, appellants, vs. The Baltimore & Ohio Railroad Company et al. Filed November 30, 1912. File No. 23437.





NO. 335

In the District Court of the United States

October Term, 1912.

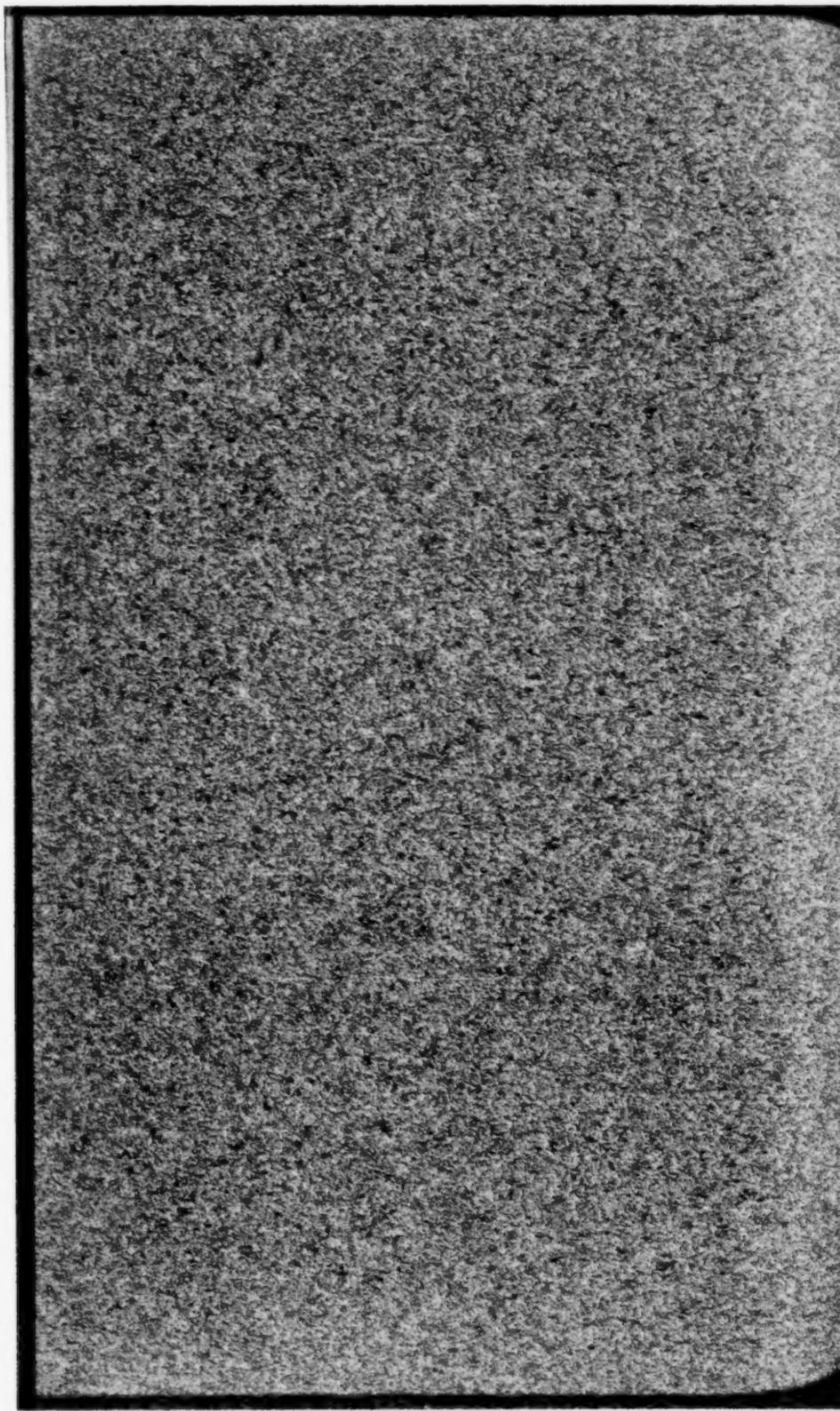
**THE UNITED STATES, APPELLANT, INTERSTATE COM-
MISSION COMMISSION AND FEDERAL SUGAR REFIN-
ING COMPANY, INTERVENING APPELLANTS,**

**THE BALTIMORE & OHIO RAILROAD COMPANY AND
SIX OTHER RAILROAD COMPANIES, APPELLANTS;
JOHN AMUCHALE AND WILLIAM A. JAMISON, DO-
ING BUSINESS AS AMUCHALE BROTHERS AND, AS
JAY STREET TERMINAL AND BRIDGEPORT EASTERN
DISTRICT TERMINAL, INTERVENING APPELLANTS.**

THE NEW YORK LUMBER CASE.

MOTION OF THE UNITED STATES TO DISMISS.

AMERICAN NATIONAL BANK & TRUST COMPANY



In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, APPELLANT, Inter-
state Commerce Commission and Fed-
eral Sugar Refining Company, inter-
vening appellants,

v.

THE BALTIMORE & OHIO RAILROAD COM-
pany and Six Other Railroad Com-
panies, appellees; John Arbuckle and
William A. Jamison, doing business as
Arbuckle Brothers and as Jay Street
Terminal, and Brooklyn Eastern Dis-
trict Terminal, intervening appellees.

No. 862.

THE NEW YORK LIGHTERAGE CASE.

APPEAL FROM THE COMMERCE COURT. MOTION OF THE UNITED STATES TO ADVANCE.

The Solicitor General on behalf of the United States moves the court to advance this cause for early hearing. (Rule 26, subsec. 4.)

This is the second appeal in this case, having been heretofore adjudicated under the style of *United States v. Baltimore & Ohio Railroad Company*, 225 U. S. 306, where this court affirmed the order of the Commerce Court granting the preliminary injunction and remanded the case in order that the Commerce Court might dispose of the case on the merits.

This appeal is from the final order or decree of the Commerce Court on the merits entered November 15, 1912, annulling the order of the Interstate Commerce Commission of December 5, 1910, and perpetually enjoining the enforcement thereof.

The following questions, among others, are involved:

I.

Whether or not the seven trunk lines and John Arbuckle and William A. Jamison are not violating that part of section 1 of the act to regulate commerce known as the commodities clause, and are without any standing in a court of equity to contest the order of the Interstate Commerce Commission condemning the arrangement in and by which they operate the Jay Street Terminal as a public freight station for and as a part of the railway systems and transport in interstate commerce the sugar which Arbuckle and Jamison manufacture, sell, and otherwise deal in, and in which they are interested, directly or indirectly, thus combining into one the railroad business and the sugar business.

II.

Whether or not the allowances made by the trunk lines to John Arbuckle and William A. Jamison on sugar manufactured, sold, and otherwise dealt in and transported by them from Jay Street Terminal to the Jersey shore and the refusal of the trunk lines to make like allowances to Federal Sugar Refining Company, which transports its sugar from Pier 24, North River, to the Jersey shore, results in the preference and discrimination forbidden by the act to regulate commerce.

III.

Whether or not the trunk lines may examine into the history of the freight and make a difference in rates because of differences in circumstances before their service of carriage begins and hold that the receipt and handling of freight at the Jay Street Terminal by John Arbuckle and William A. Jamison for the general public constitutes a dissimilarity of circumstances and conditions in the handling of their sugar from Jay Street Terminal to the Jersey shore as compared with the handling of the sugar of Federal Sugar Refining Company from Pier 24, North River, to the same point.

IV.

Whether, by reason of the geographical location of the plant of Federal Sugar Refining Company at Yonkers, N. Y., outside the lighterage limits, it is

beyond the power of the Interstate Commerce Commission to find that an undue preference and an unjust discrimination exists and that it is beyond the right of Federal Sugar Refining Company to complain that the seven trunk lines are preferring John Arbuckle and William A. Jamison and unjustly discriminating against it in granting to them the privilege of performing for an allowance a part of the transportation service and withholding from it the like privilege.

V.

Whether or not the seven trunk lines may pay John Arbuckle and William A. Jamison for the transportation service of handling sugar from Jay Street Terminal to the Jersey shore and enforce an arbitrary rule which deprives Federal Sugar Refining Company of compensation for the transportation service of handling sugar from Pier 24 to the Jersey shore, both points of origin being within the lighterage limits.

VI.

The public interests are involved, and the priority suggested is authorized by section 2 of the act of June 18, 1910. (36 Stat., 542.)

Due notice of this motion has been served upon counsel for the appellees.

Wm. MARSHALL BULLITT,
Solicitor General.



JAN 16 1918

THE SUGAR LIGHTERAGE CHARGES IN BOSTON

In the Supreme Court of the United States,

October Term, 1918.

No. 885

THE UNITED STATES, INTERSTATE
COMMERCE COMMISSION, AND PEDI-
EAL SUGAR REFINING COMPANY, *Appellants*,

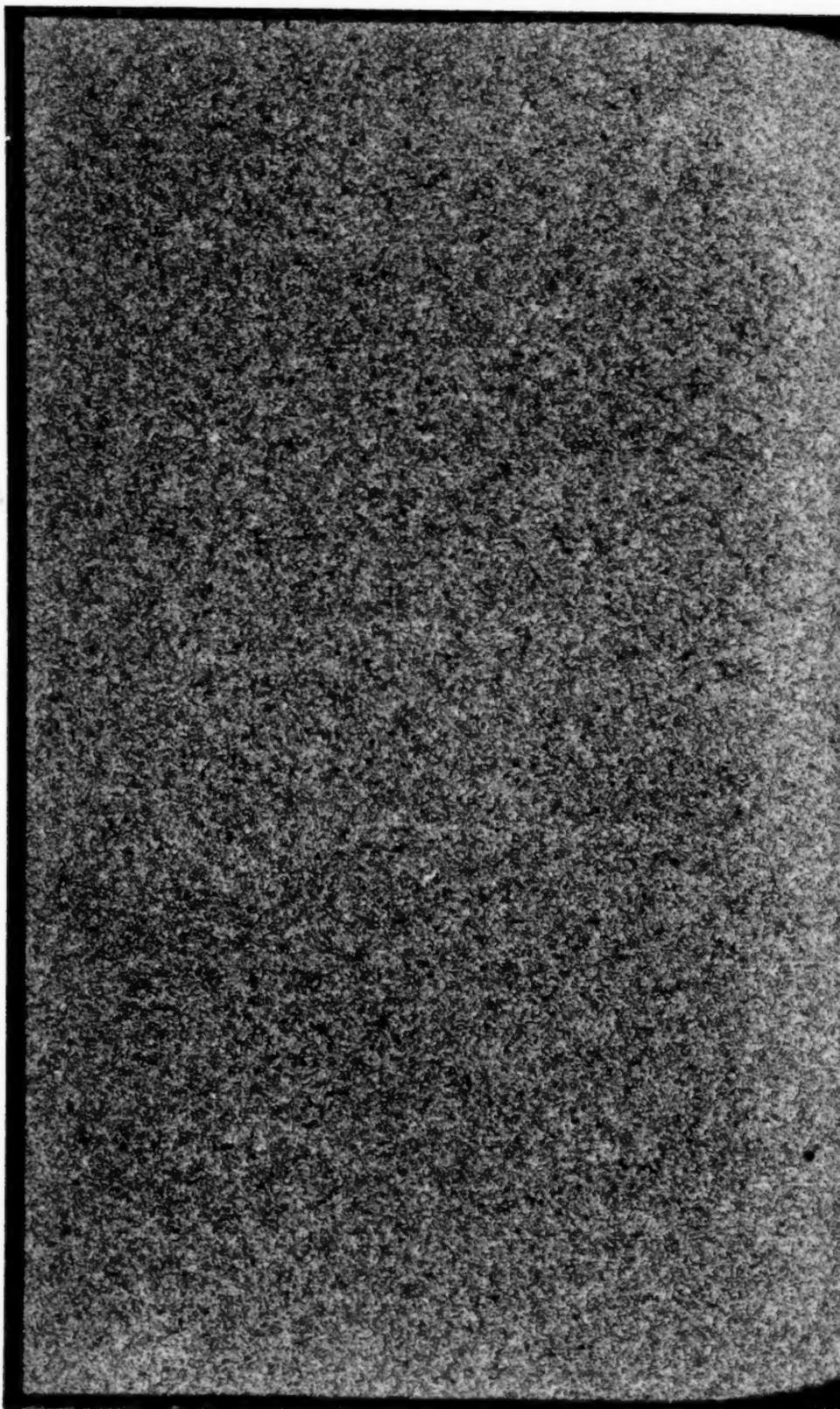
THE BALTIMORE & OHIO RAILROAD
COMPANY ET AL., *Appellees*

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES

In support of the contention (1) that a shipper operating a large railway terminal transporting coal by railroad, and then one State to another, is not a common carrier by railroad subject to the Interstate Commerce Act; and (2) that a shipper is of course not authorized to employ a carrier to perform the entire transportation service of all freight from one State to another constituting an integral portion of the journey.

WM. MARSHALL MURPHY,
Solicitor General.



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FIRST POINT. Arbuckle Bros. in operating the Jay Street Terminal and in transporting freight by floats, etc., between Brooklyn and Jersey City are an integral part of the through trunk line systems operating into and out of Greater New York, and as such are common carriers by railroad, and are subject to the Interstate Commerce Act..... 12-22

United States v. Union Stock Yard, 226
U. S. 286, 302, 304, 306.

United States v. Delaware and Hudson Co.,
213 U. S. 366.

SECOND POINT. The Hepburn Act does not authorize the railroads to make the arrangement in question with Arbuckle Bros. and to pay them for their services in transporting freight between Brooklyn and Jersey City .. 22-28

*Interstate Commerce Commission v. Difffen-
baugh*, 222 U. S. 42.

Union Pacific Railroad v. Updike Grain Co.,
222 U. S. 215.



In the Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 862.

THE UNITED STATES, INTERSTATE
COMMERCE COMMISSION, AND FED-
ERAL SUGAR REFINING COMPANY,

Appellants,

v.

THE BALTIMORE & OHIO RAILROAD
COMPANY ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

This appeal involves more than a mere contest between two rival sugar refineries. It involves a fundamental question concerning the relations of railroads to shippers under the interstate commerce act.

When reduced to its last analysis it simply comes to this: May a railroad employ and pay one shipper to perform for it a substantial portion of the interstate transportation duties imposed by law upon the railroad? There is the further fact (alleged on one side and denied on the other) that the result of such

an arrangement is to deny another shipper the same privileges and thereby to cause an unjust discrimination between shippers.

Looked at from the narrower point of view of mere discrimination between two shippers, there is much to be said on both sides, as will be seen from the briefs filed by the Interstate Commerce Commission and the Federal Sugar Refining Company on the one side and by the railroads, Jay Street Terminal, etc., on the other. We propose to deal with the subject in a broader aspect than the mere rights of two shippers under the particular circumstances of this case.

STATEMENT OF THE CASE.

1. *Physical conditions at New York Harbor and their effect upon trunk line railroads.*

A. New York, as the largest and most important city of this country, is situated upon an island, separated from the West and South by the North River, too broad and deep to be bridged or tunneled. The numerous trunk line railroads connecting New York with the West and South have their termini at Jersey City on the banks of the North River; but since railroad transportation began, the railroads have, for practical reasons too obvious for elaboration, treated, not Jersey City, but New York and Brooklyn, as their actual termini; (1) publishing tariffs and advertising freight and passenger through rates; (2) selling tickets; and (3) issuing bills of lading—all from New York and Brooklyn and not from Jersey City.

The railroads have always, in one way or another (by ferries, floats, lighters, etc.), furnished the facilities for transporting passengers and freight to and from Jersey City to New York and Brooklyn across the North and East Rivers. (R., 29, 33.) The business of New York was the great commercial prize they were all striving for. (R., 2.)

B. Accordingly, the railroads established "lighterage" limits embracing practically all of New York and Brooklyn, within which boundaries they would receive and deliver freight at the New York rate, which was the same as the Jersey City rate; thus, in effect, the railroads would at their own expense carry the freight across the river to and from Jersey City. The railroads received and delivered such freight at practically any public or private dock in New York or Brooklyn; and, in addition, they established various public terminal stations at different points in New York and Brooklyn, some of which terminal stations were for the use of a single railroad, while others were union terminals used jointly by two or more railroads. (R., 2, 26-27, 108-109.)

C. Therefore, as the result of physical or topographical conditions in connection with the historical development of railroad transportation to and from New York City, it must be considered as settled that railroad transportation was in fact begun and ended, not at Jersey City but at the New York and Brooklyn water front—the transfer across the river being (1) always undertaken by all the railroads as an integral part of their common carrier duty, and (2) gladly so

undertaken as one of the necessary incidents to secure business, which otherwise, from mere considerations of convenience, would have gone to any road that would do so, or possibly to the roads entering New York from the North.

We start, then, with the fixed fact that all railroad transportation begins and ends at New York and Brooklyn (R., 3, 118), and Arbuckle Bros. so contend (brief for Jay Street Terminal and Arbuckle Bros., p. 37, et seq.), saying that upon receipt of the freight at Jay Street Terminal, "the railroad journey and responsibility begins" (p. 43); and so do the railroad companies (Brownell's brief, p. 45).

2. Relations between the railroads and the shippers as to the transfer across the river between New York and Jersey City.

A. In the earlier days the railroads used the transfer by water from New York or Brooklyn to Jersey City as a convenient method of giving secret rebates to large shippers. The method adopted was to use the shipper's dock or to permit him to perform certain services, and then to give him an allowance (which was simply a rebate), so as to put him on a preferred basis. The railroads had to do it in order to get the business. (R., 48-50.)

B. After the passage of the Elkins Act, while the railroads published their allowances to shippers for the latter's services in furnishing terminal facilities and in transporting freight to Jersey City for physical delivery to the railroads, yet as it confined the allowances to certain shippers only, they were still rebates. (R., 49.)

3. *The arrangement now complained of between the railroads and Arbuckle Bros.*—Arbuckle and Jamison are partners, operating (1) a large sugar refinery in Brooklyn under the firm name of Arbuckle Bros.; and (2) adjacent thereto a terminal depot and common carrier business between Brooklyn and Jersey City under the firm name of Jay Street Terminal. It is important to bear in mind that it is one and the same thing; two individuals as partners dividing their business into two sections, and carrying on part under one name and part under another name, but it is one and the same firm. They are absolutely identical.¹

As the Interstate Commerce Commission and the Commerce Court both use the firm name of Arbuckle Bros. to designate the operators of the refinery and of the Jay Street Terminal, we will likewise stick to the name of Arbuckle Bros. as covering both firms. Arbuckle Bros. own in Brooklyn and adjacent to their refinery an extensive river-front property, upon which they have erected warehouses,

¹ The Interstate Commerce Commission (R., 28, 30, 44, 45, 50, 53-55, 67), the Commerce Court, both the majority and dissenting judges (R., 118, 120), and all the parties themselves (R., 4-6, 70, 85, 89, 97) united in holding and treating Arbuckle Bros. and Jay Street Terminal as absolutely identical and as interchangeable terms; which is strictly accurate in law (Burdick on Partnership (2d ed.), 83, 84; 1 Lindley on Partnership, 2 Am. Ed., 111, 112, 116; *Campbell v. Coal & Iron Co.*, 9 Colo., 60; *Banco de Portugal v. Waddell*, 5 App. Cas., 161, 167, 168, 175; *In re Williams & Co.*, 3 Woods (U. S.), 493; see also *Bosenquet v. Wray*, 6 Taunton, 597; *Taylor v. Thompson*, 176 N. Y., 168; *Burrows v. Leech*, 116 Mich., 32, 35; 30 Cyc., 482-483.)

bulkheads, docks, piers, railway tracks and sidings, and all the usual appurtenances for a terminal station to be used in connection with railway and water transportation; and they also own all the necessary boats, floats, lighters, etc., necessary for carrying railroad cars back and forth between that property and the railway tracks of the railroads at Jersey City so as to afford a continuous carriage of freight cars (without transfer or breaking bulk) from Brooklyn to all points in the United States reached by the railroads whose rails run to Jersey City. By an arrangement between Arbuckle Bros. and the railroads that river-front property is used as a union terminal by the railroads and is called the Jay Street Terminal. It is advertised as the terminus of the railroads, and incoming freight is delivered there, and through bills of lading in the names of the railroads are issued for outgoing freight; joint published tariffs are issued by the railroads and Arbuckle Bros., thus establishing the fact that Arbuckle Bros. are common carriers doing an interstate railroad business (as otherwise they would not issue tariffs, etc.); and as between the railroads and the shipping public (1) Brooklyn is the terminus of the railroad; (2) the liability of the railroad begins and ends there; and (3) the transportation between Brooklyn and Jersey City and *vice versa* is the act of the railroad. In point of fact, however, all the clerical and physical labor and equipment required for the receipt, discharge, and transfer of freight between Jersey City and Brooklyn is done by Arbuckle Bros. exclusively—but done in the name and on behalf of the

railroads. In short, Arbuckle Bros. furnish complete all the necessary warehouses, docks, wharves, and other terminal facilities (real estate and personality), locomotives, cars, boats, floats, lighters, and labor, and perform all the services of every kind and description between the receipt of freight at Brooklyn from consignors (or its delivery there to the consignees) on the one hand and the transfer of the landed freight cars to and from the railroads at the end of their rails at Jersey City. That is to say, Arbuckle Bros. operate complete in every detail so much of the through railway transportation as exists between the Brooklyn consignor or consignee and the physical rail ends of the railroads at Jersey City. Arbuckle Bros. are a railroad company within the meaning of the Interstate Commerce Act. The railroads pay to Arbuckle Bros. for their services (including the use of their real estate as a terminal station, docks, piers, warehouses, clerical force, boats, floats, lighters, labor, transportation, etc.) a compensation based on the tonnage carried by Arbuckle Bros. both ways between Brooklyn and Jersey City, to wit, 3 cents per 100 pounds on freight East of Pittsburgh, and 4½ cents per 100 pounds on freight West of Pittsburgh. (R., 17, 45.)¹ Under this

¹ For precisely the same service Arbuckle Bros. received a different compensation according to whether the freight originated at (or is destined to) a point East or West of Pittsburgh. That may possibly be justified on the sliding-scale theory that the railroads can give to Arbuckle Bros. a larger sum where the total freight rate is larger; and no point will be made in the brief of that difference. It is fully considered in the other briefs.

arrangement Arbuckle Bros. carry (and are paid at the above rates for carrying) freight belonging to themselves and to the outside public. (R., 6, 45.)

About one-third of the total tonnage carried by Arbuckle Bros. consists of their own commodities, to wit, coffee and sugar. (R., 6, 89.)¹ The result of the arrangement is that if the rate on sugar from New York to Cincinnati is (say) 15 cents, Arbuckle Bros. by delivering the sugar at Jersey City receive back 4½ cents, making the net rate only 10½ cents; whereas a competitor at Jersey City must pay 15 cents, or another competitor in New York must also pay 15 cents (although such other competitor is relieved of carrying his sugar across the river, as the railroads are willing to receive and deliver freight at their own expense on the New York river front). (R., 3.)

Arbuckle Bros. thus have 4½-cent freight rate advantage over their competitors, with only the added burden of carrying the freight across the river. The railroads get relieved of carrying the freight across the river and receive but 10½ cents for their own services.

Certain competitors of Arbuckle Bros. say, in effect, that if the railroads are willing to carry

¹ The fact that about 80 per cent of the sugar shipments has been sold by Arbuckle Bros. f. o. b. Brooklyn does not substantially alter the situation, because (1) it still leaves all the coffee and over 20 per cent of the sugar carried belonging to Arbuckle Bros., and (2) it is so closely interwoven with the situation that the mere f. o. b. sale can not legalize an arrangement if such arrangement be otherwise unlawful.

Arbuckle Bros.' sugar from Jersey City to Cincinnati for 10½ cents there is no just reason why they should not also be willing to carry everybody else's sugar for the same sum; and, therefore, such competitors say, "We will deliver our sugar to you at Jersey City just as Arbuckle Bros. do and we want to receive a similar 4½-cent allowance (or 3 cents as the case may be) so as to be on an exact equality with Arbuckle Bros. in the matter of freight rates."

It is that situation that creates the point of controversy.

4. *The original complaint of the Federal Sugar Refining Company of Yonkers.*—The Federal Sugar Refining Company of Yonkers had a refinery at Yonkers, which is *outside* the "lighterage" limits. In order to ship its product over the railroads in question, the sugar was sent by boat from Yonkers to Jersey City, which service was performed by the Ben Franklin Transportation Company (a private boat corporation) under contract with the refinery company.

The railroads refused to pay the Federal Sugar Company the same (or any) allowance or refund which they paid Arbuckle Bros. Thereupon, the Federal Sugar, etc., Company filed its complaint with the Interstate Commerce Commission alleging that the railroads discriminated against it and in favor of Arbuckle Bros. (R., 7, 19.)

The Interstate Commerce Commission held that as the Federal refinery was in Yonkers *outside* the

lighterage limits (the fixing or extension of which was a matter of business discretion for the railroads), there was no obligation on the part of the railroads to give to it the same treatment they gave Arbuckle Bros.; Commissioners Lane, Clements, and Harlan dissented. (R., 24-37; 17 I. C. C. Rep., 40.)

5. *The second complaint of the Federal Sugar Refining Co.*—To conform to the views of Commissioner Clark (who filed a concurring opinion, R., 32) the Federal Sugar Company adopted the following plan: A new corporation of practically the same name was organized and it took over the refineries, etc., established its office in New York City, and had the sugar shipped by boat from Yonkers to Pier 24 in New York City, where the boat was docked. The captain of the boat then telephoned from Pier 24 to the New York office for instructions; and that office then handed him (1) written instructions to take the sugar to Jersey City and deliver it to the railroads, and (2) unsigned bills of lading to be executed by the railroads. The boat then took the sugar to Jersey City, where it was delivered to the railroads, who signed the bills of lading which the New York office had prepared in advance for their execution. (R., 8-9, 46-47).

6. *The decision of the Interstate Commerce Commission.*—The railroads still refused to pay the Federal Sugar Company the same (or any) allowance that they paid Arbuckle Bros.; and on a second complaint being filed with the Interstate Commerce Commission it held by a vote of 5 to 2 that the

railroads had no right to make the allowance to Arbuckle Bros. and yet refuse to make any allowance to their competitor, the Federal Sugar Company. (R., 43-60; Commissioners Knapp and Prouty dissenting, R., 60-66; 20 I. C. C. Rep., 200).

The Interstate Commerce Commission then entered an order to the following effect (R., 67):

- I. That by paying the allowances to Arbuckle Bros. while not paying any to the Federal Sugar Company, the railroads unduly discriminated against the Federal Sugar Company and unduly preferred Arbuckle Brothers.
- II. That the railroads should for two years cease "from paying such allowances to Arbuckle Brothers *on their sugar* while at the same time paying no such allowances to said complainant [Federal Sugar Company] on its sugar"; which allowances so paid to Arbuckle Bros. are found to be "unduly discriminatory and in violation of the act to regulate commerce."

7. *The Commerce Court enjoined the enforcement of the order.*—The railroads brought suit in the Commerce Court to prevent the enforcement of the order (R., 1); Arbuckle Bros. and the Brooklyn Eastern District Terminal intervened (R., 70, 85); a preliminary injunction was granted (R., 102); and on appeal to the Supreme Court the granting of the preliminary injunction was upheld pending a determination of the case on its merits. (*U. S. v. B. & O. R. R. Co.*, 225 U. S. 306.)

Subsequently the United States and the Federal Sugar Company withdrew their answers (R., 103); and moved to dismiss the petition upon the face of the papers (R., 104).

The case was submitted for final hearing upon the petition and intervening petitions alone. The Commerce Court (Judge Mack dissenting) held that the change in the method of shipment by stopping at Pier 24 was ineffective; that it must be treated as a shipment from New York by boat; that the railroad transportation only began at Jersey City; that it was legal to pay Arbuckle Bros. for performing a part of the transportation service; that Arbuckle Bros. and the Federal Sugar Company were so dissimilarly situated that there was no discrimination; and therefore a permanent injunction was granted. (Opinion R., 105-119; dissenting opinion R., 119-123.)

FIRST POINT.

Arbuckle Bros. in operating the Jay Street Terminal and in transporting freight by floats, etc., between Brooklyn and Jersey City are an integral part of the through trunk line systems operating into and out of Greater New York, and as such are common carriers by railroad, and are subject to the Interstate Commerce Act.

1. The railroads and Arbuckle Bros. allege that Arbuckle Bros. are engaged in the "receipt, handling, and delivery of freight at said terminal and the transportation thereof between said terminal and the railroad terminals of your petitioners [railroads] on the western shore of New York Harbor" and have

"devoted its real and personal property to the public uses"; that Arbuckle Bros.' Terminal "is a union freight terminal and is designated as a regular public freight terminal of the complainant railroad companies in their tariffs duly filed with the Interstate Commerce Commission"; that Arbuckle Bros. "float eastbound freight from the rails of the western shore of New York Harbor to the docks, wharves, and float bridges at Brooklyn and there unloads it from the cars and delivers it to the consignees," and "receives westbound freight from the shippers and loads it into cars and floats the cars loaded to the said rails," and "performs the movement in either direction of empty cars between the Jay Street Terminal and the railroad companies' terminals on the West shore of New York Harbor, issues waybills, and performs other necessary clerical services, and in general furnishes all work and services required for the receipt or delivery of freight as at any public station of the railroad companies and for the transportation of said freight between the Jay Street Terminal and the complainant railroad companies' terminals on the West shore of New York Harbor," and publish joint tariffs with the railroad companies. These facts, taken in connection with the further fact that all the railroad companies make through rates from Brooklyn and New York to western points covering (1) the service performed by Arbuckle Bros., and (2) the transportation by rail from Jersey City westward, show such a continuity of transportation as to render argument unnecessary that the transpor-

tation from Brooklyn to western points is by one continuous transportation by railroad. The mere fact that the physical rails stop at Jersey City does not mean that the railroad transportation there ends. It continues over to Brooklyn by means of car floats, upon which further rails are laid and on which empty and loaded freight cars stand and are transported, so that the rails upon the car floats are brought into contact with the rail ends at Jersey City and the continuation thereof at Brooklyn, and in this way the transportation by railroad is carried on without interruption from the western points directly to Brooklyn.

Indeed, in the briefs filed in this court by Wm. N. Dykman, Esq., for Arbuckle Bros., and by Geo. F. Brownell, Esq., for the railroad companies, it is urged (1) that "the *railroad journey* and responsibility begins * * * when the Jay Street Terminal receives Arbuckle sugar for shipment" (Dykman, p. 43), and (2) that the service performed by Arbuckle Bros. is *not* accessory but is "a part of the transportation" (Brownell, p. 45). So we are agreed on that point.

In *United States v. Union Stock Yard*, 226 U. S. 286, 302, 304, 306, a stock yard company performed the usual stock yard services; a junction railway performed the usual switching services (within a State) in connection with the transportation of live stock, etc., between the stock yard and the railroads. It was held that both the stock yard company and the

junction railway were common carriers and subject to the interstate commerce act. This court said:

From this statement it is apparent that the Stock Yard Company was organized for the purpose of maintaining a stockyard, with the usual facilities of such yards as to loading and unloading and caring for freight, and it was authorized to and did own and operate a railroad system, transporting cars to and from trunk lines in the course of their transportation from beyond the State and to points outside of the State. This service, so far as the railroad and its operation is concerned, is now performed by the Junction Company. The Stock Yard Company still continues to perform the customary stockyard operations, and by means of the lease to the Junction Company it has divested itself of the operation of the railroad system which it was authorized by its charter to construct and operate and which for many years before the lease it did in fact operate. The Stock Yard Company, under the lease, still gets, however, two-thirds of the profits received by the Junction Company for performing the service in connection with the railroad transportation. This joint service now takes the place of the single service formerly rendered by the Stock Yard Company. The stock of both these companies is held in common ownership by the Investment Company and it appears that the Investment Company guarantees the contracts, or at least some of them, of the Stock Yard Company.

In view of this continuity of operation, the manner of compensation and the performance of service in connection with interstate transportation by railroads such as are described, are the Stock Yard Company and the Junction Company subject to the terms of the act to regulate commerce and bound to conform to its requirements? * * *

Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service. * * * Together these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk-line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such, and constantly act in that capacity, and because they are so treated by the great railroad systems which use them. * * *

We think that these companies, because of the character of the service rendered by them,

their joint operation and division of profits, and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control. We therefore think the Commerce Court was right in holding that the Junction Company should file its rates with the Interstate Commerce Commission and that it should also have held the Stock Yard Company subject to the provisions of the Interstate Commerce Acts.

We submit that Arbuckle Bros. are common carriers and subject to the interstate commerce act as certainly as were the Stock Yard Co. and Junction Railway. Indeed, Arbuckle Bros. seem to have so recognized it, as all their contracts with the railroads refer to "the *joint published tariffs* of itself [Jay Street Terminal] and the railroad company" (R., 17)—which means nothing except that the Jay Street

Terminal [Arbuckle Bros.] file tariffs under the interstate commerce act.

2. Arbuckle Bros. transport their own commodities, to wit, sugar and coffee, to the extent of about one-third of the total tonnage moving in and out of the Jay Street Terminal to and from Jersey City (R., 6, 89).¹

A shipper is thus carrying his own commodities.

3. At the risk of repetition we direct especial attention to the fact that counsel for both Arbuckle Bros. and the railroad companies unite in conceding, and indeed urge, that the service performed by Arbuckle Bros. in floating the cars between Brooklyn and Jersey City is a part of the through railroad transportation, and "*the railroads themselves extend to these New York and Brooklyn stations.*" That contention establishes our proposition that Arbuckle Bros. are engaged as common carriers in the business of railroad transportation in interstate commerce.

The commodities clause of the Hepburn Act provides as follows (act June 29, 1906, 34 Stat., 584, 585):

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other

¹ That about four-fifths of the sugar is sold f. o. b. Brooklyn does not affect the principle involved, for the other 20 per cent of the sugar and all the coffee are still involved. And, indeed, it is doubtful whether the sale f. o. b divested Arbuckle Bros. of such interest in the sugar as to take them from within the commodities clause.

State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Arbuckle Bros. transport commodities owned by them as a part of the through shipment from Brooklyn to western points, and as Arbuckle Bros. operate one portion of the continuous railroad transportation from Brooklyn to western points, they are a railroad company within the meaning of the "commodities clause," to wit, they are a connecting carrier.

The words "any railroad company" include the copartnership of Arbuckle and Jamison. In 8 Cyc. 399, the word "company" is dealt with, and, on abundant authority, it is said: "The word is applicable to private partnerships or incorporated bodies of men; hence it may signify a firm, house, or partnership, or a corporation, as the 'East India Company.'" And indeed Arbuckle Bros. contend that they conduct a *railroad business*. If they conduct a railroad business, they must certainly be a "railroad company" within the meaning of the commodities clause.

In *United States v. Delaware and Hudson Company*, 213 U. S. 366, the construction put by this court

upon the clause brings Arbuckle Bros. in jointly operating the railroads across New York Harbor, directly and expressly within its prohibitory terms; thus (415):

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier, or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported in whole or in part; (c) *when the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity*, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

4. If, therefore, Arbuckle Bros. are a "railroad company" within the meaning of the "commerce clause," it was unlawful for them to transport their own sugar between Brooklyn and Jersey City; and the railroad companies could not properly pay Arbuckle Bros. for performing such unlawful service.

In so far as the order of the Interstate Commerce Commission commanded the railroad companies "to cease and desist from paying such allowances to

Arbuckle Bros. on their sugar" (R. 67), it was a proper order and should not have been enjoined; and the decree of the Commerce Court should be reversed.

It is true that the order prohibits the payment to Arbuckle Bros. "while at the same time paying no such allowances to said complainant [Federal Sugar Company]" and thus seems to recognize that the arrangement is merely discriminating between the two shippers, and can be continued if it be extended to any one else demanding it. But the Government goes further, and insists that any resulting discrimination is merely accidental and incidental to the vicious arrangement, which is itself a violation not merely of the sections against discrimination but of the "commodities clause."

Without stopping to inquire what would be the situation if the railroad companies had in fact begun to pay the same allowances to the Federal Sugar Company, it is enough to say that they have not done so. Therefore, under the facts as they actually exist, the Interstate Commerce Commission's order is that the railroads shall not pay the allowance to Arbuckle Bros. If, as we have endeavored to show, Arbuckle Bros. have no right to transport their own sugar and coffee, then the railroads are participants in an unlawful scheme, and the Commission was right in ordering them to stop.

The Government, therefore, insists that as the result of the "commodities clause" it is unlawful for a railroad to employ a shipper to perform an integral portion of the transportation which the railroad has

assumed to undertake, because the shipper thereby becomes a connecting carrier (performing a portion of the through transportation), to wit, a railroad company, and hence being a "shipper" is acting in violation of the "commodities clause."

We assert the broad proposition that as the law now stands railroad companies must do the transportation of commodities; and shippers can ship commodities, but shippers can not either independently or as alleged agents for the railroad companies do that thing which is essentially the business of the railroads, to wit, the carrying of freight from one place to another in the course of the through shipment, where the distance carried is an integral part of the transportation.

If we are right in our application of the "commodities clause" to the relations between the railroads and Arbuckle Bros., it is an unlawful traffic arrangement, and the Commission was right to stop it.

SECOND POINT.

The Hepburn Act does not authorize the railroads to make the arrangement in question with Arbuckle Bros. and to pay them for their services in transporting freight between Brooklyn and Jersey City.

The railroad companies insist that section 15 of the Interstate Commerce Act (Hepburn Amendment June 29, 1906, 34 Stat., 584, sec. 4) permits them to pay Arbuckle Bros. for the services they render.

The question of how far railroads may go in paying shippers compensation for services rendered or prop-

erty used in connection with transporting the shippers' freight is an old one. It was a means of enabling railroads to grant rebates and prefer shippers by paying exorbitant compensation to the shipper for his services or for the use of his property. On the other hand, it was frequently almost essential to do so because (1) of the property rights that had grown up under the system, and (2) there are many cases where such services can be rendered or facilities furnished more advantageously both to the shipper and the railroad (without any injury to the public or other shippers) if provided by the shipper himself. See *Interstate Commerce Commission v. Difffenbaugh*, 222 U. S., 42; 10 I. C. C. Rep., 309; 12 Id., 85; 14 Id., 315, for a history of the views of the Interstate Commerce Commission on this subject and their change of opinion as to the extent to which such payments might be made.

By the Hepburn Act, Congress amended section 15 of the Interstate Commerce Act by adding the following provision to cover the conditions just referred to:

If the owner of property transported under this Act directly or indirectly renders any service *connected with* such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished.

The Government insists that the act authorizes a railroad to pay the shipper a just and reasonable allowance for two things only, to wit (*a*) the use of some physical instrumentality, such as private cars, etc., and (*b*) some incidental service ancillary to transportation, such as elevating grain, feeding and watering cattle, transferring freight from car to car in transit, etc.

But the Government insists that the act does not permit a payment for the *transportation itself*. That is the business of the railroad company. It can not farm it out. It can not, under section 15, let a shipper become in effect a railroad and do an integral portion of the transportation.

In short, we contend that while section 15 (taken in connection with the "commodities clause" passed at the same time) authorizes a shipper to perform (even in relation to his own commodities as well as those of other shippers) services "*connected with* such transportation" or to furnish "any instrumentality used therein," yet that language does not authorize the shipper to undertake the whole *transportation* for any part of the journey.

Observe the language: It does not say that the shipper may perform or undertake the transportation, but only that if the owner of property "*transported*" under the act "*renders any service connected with* such transportation," etc. Now, that language clearly implies two things: *First*, that the property is being "*transported*" by some one *other* than the shipper, and, *second*, that when such is the

case and the shipper "renders any service *connected with* such transportation" by another, the shipper may be compensated.

The railroad companies contend that under section 15 they can employ the shipper to run a great terminal system and to transport freight (his own and others) from one State to another, but if that be the true construction of the act it destroys the "commodities clause" absolutely, for a railroad could employ a coal-mine operator to run a railroad from the mines to the markets.

The opening words of section 15, to wit, "If the owner of property transported under this act," fix the condition under which compensation can be paid. They clearly refer only to a case where the property is being "transported" by another; and then, and in such event, if the owner renders (not the transportation itself) but any service *connected with* such transportation by another, the owner is entitled to a reasonable allowance for such "connected" services.

Arbuckle Bros. do not perform "any service *connected with* such transportation," but they perform the *whole* transportation itself. They furnish not "any," but *every* "instrumentality used therein"; and while the act contemplates that the shipper may properly furnish some instrumentality to be used *by the railroad company* in the transportation, here we have Arbuckle Bros. furnishing all the instrumentalities used *by themselves* in the whole transportation.

After all, it comes down to a question of the meaning of the words used in section 15. Taken in con-

nection with the character of questions that had arisen between the railroads and shippers, the character of arrangements intended to be allowed as reflected in the 19th Annual Report of the Interstate Commerce Commission to Congress (dated Dec. 14, 1905) which dealt alike with "Refrigeration charges" and "Terminal roads, elevator charges, and private cars" which dealt with this very subject and resulted in the passage of section 15, it seems very clear that the things permitted by section 15 are only things incidental to transportation by the railroad, and are not the whole transportation itself.

In *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, the service allowed under section 15 was merely the elevation of grain from one car, its passage through an elevator, and its return to another car for continuance in transportation—rendered necessary by the desire of the Union Pacific not to let its cars pass beyond its own termini over connecting lines, but to have the grain shifted to other cars. The service performed by the owner (shipper) was merely the transfer of the grain from car to car, which was clearly a service "connected with transportation" and was not the "transportation" itself. This court in its opinion clearly indicates that it so regarded the matter by its references to the elevators as "these instruments of transfer" (p. 44); that "Congress clearly recognized that services such as those rendered by Peavey & Co. were services in transportation" (p. 45); that "the act of Congress in terms contemplates that if the carrier

receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them" (p. 46); that "as the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owing it" (p. 47). All of these expressions in the opinion indicate clearly that the property is to be transported by the carrier and that the carrier is to use the instrumentalities but that the shipper may either furnish the instrumentalities so used by the carrier or may perform some services in connection with the transportation carried on by the carrier. But that certainly does not mean that the shipper can perform one complete lineal section of the transportation and the railroad perform another lineal section of the transportation. Such a division in the transportation is not a service in connection with transportation, but is an apportionment of transportation.

In *Union Pacific Railroad v. Updike Grain Co.*, 222 U. S. 215, the same question of elevator service was involved; and the allowance there authorized was again merely in connection with the shifting of grain from one car to another.

Congress never intended by section 15 to authorize a railroad to make an arrangement with the shipper by which the shipper would furnish all the instrumentalities of transportation and undertake the transportation itself so as to conduct the com-

plete transportation business for a considerable portion of the interstate journey, leaving the railroad to perform a similar service with reference to the balance of the interstate journey. Such an arrangement would simply mean that the interstate journey was divided between two transportation companies, one called a railroad and the other called a shipper, but each performing and doing exactly the same thing. If there has been one consistent intention on the part of Congress it has been to separate the business of the railroads and the shippers, so that the railroads would do the transporting business and the shippers would simply have their freight transported by the railroads on equal terms.

If section 15 authorizes such an arrangement as the railroad companies now contend for it would open the door for all the abuses which the Interstate Commerce Act was intended to prevent.

CONCLUSION.

The Interstate Commerce Commission based its order upon the assumption that the railroads had the right to make the arrangement in question with Arbuckle Bros., but must make a similar arrangement with any other shipper who desired it. If the Government's view on this question is correct the order of the Interstate Commerce Commission did not go far enough. But even if that order were based upon a view of the law too favorable to the railroads and the shippers, nevertheless the decree of

the Commerce Court enjoining its enforcement should be reversed. The railroads have no right to enjoin the enforcement of an order prohibiting an unlawful arrangement. If the railroads and Arbuckle Bros. have entered into an arrangement that is contrary to law they have no standing in a court of equity to enjoin an order prohibiting them from carrying out such an illegal arrangement and thereby enable them to continue an arrangement that is in violation of law.

This question will be dealt with in an appendix to this brief, page —, *infra*.

WM. MARSHALL BULLITT,
Solicitor General.

JANUARY 15, 1913.

APPENDIX.

The Commerce Court legalized the arrangement between the railroads and Arbuckle Bros., and in so doing destroyed the commodities clause.

"He who comes into equity must do so with clean hands." The railroads and Arbuckle Bros. rest their whole case on their illegal transactions in dealing in commodities which they transport and sell in interstate commerce. That being so, it is beyond their power to overthrow the order of the Interstate Commerce Commission, whether right or wrong, condemning the arrangement as discriminatory.

Having thus made up their case, it is likewise beyond their power to escape the consequences, for their illegal transactions have an important and necessary relation to the equity sued for. In *Dering v. Winchelsea*, 1 Cox 318, the court say:

A man must come into a court of equity with clean hands; but when this is said it does not mean a general depravity; *it must have an important and necessary relation to the equity sued for.*

In *City of Chicago v. Union Stock Yard & Transit Co.*, 164 Ill. 224, the Supreme Court of Illinois did not apply the rule, as the iniquity charged against the complainant did not connect with the subject matter of the litigation, but it announced the rule as the law of that State, thus (238):

If a defendant to a bill in equity brought by a corporation could defeat it by simply showing that the complainant had committed

ultra vires acts, then no corporation so guilty could ever obtain equitable relief in any case. The maxim must have the same application as between individuals, and as said in Bispham's Principles of Equity (p. 48), it "only applies to the particular transaction under consideration, for a court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters or questioning his general character for fair dealing." The wrong must have been done to the defendant himself and must have been in regard to the matter in litigation. (1 Pomeroy's Eq. Jur., secs. 387, 434; 6 Am. & Eng. Ency. of Law, 708. See also *Kadish v. Garden City Loan Ass.*, 151 Ill. 531; *Dering v. Earl of Winchelsea*, 1 Cox's Ch. 318; *Ansley v. Wilson*, 50 Ga. 418; *Sylvester v. Jerome*, 34 Pac. Rep. 760; *Langdon v. Templeton*, 66 Vt. 173; *Bateman v. Fargason*, 4 Fed. Rep. 32.)

In *Weiss v. Herlihy*, 49 N. Y. Supp. 81, the plaintiff, who conducted a restaurant business, filed a bill to enjoin the defendant, a captain in the police department of the city of New York, from keeping policemen stationed in and about the restaurant, which had resulted in a serious diminution of his business and loss of profits; it was alleged that if the policemen continued to remain in the place his patrons would be driven away and his business completely destroyed. The defendant, in answering the bill, alleged that for a long time the place had been known as a notorious gambling house, that violations of the law were continually being permitted there, and that the policemen were stationed there simply to prevent or detect such violations of the law. The evidence showed that the plaintiff was keeping a common gambling house, and a resort of bad people, in a place

which had been notorious as such for over a year. The court of first instance denied the motion for a preliminary injunction. On appeal to the appellate division of the supreme court the order was affirmed, the court saying (pp. 86, 87):

* * * if it shou'd be conceded that the plaintiff had established what would be a good cause of action in equity under ordinary circumstances, yet we do not think that the facts in this case are such as to commend him to the equitable jurisdiction of the court, or within well-settled principles to authorize the court to issue its extraordinary process for his protection. The rule is well settled in equity that he who comes into equity must come with clean hands; or, as it is otherwise stated, he that hath committed iniquity shall not have equity. This rule, of course, does not go so far as to deprive one of the privilege of going into equity to enforce his property rights simply because he is generally of a bad character, or because he is enraged in some violation of law in another case than the one in which he seeks an interposition of the court. When a court of equity is appealed to for relief, it will not go outside of the subject-matter of the controversy, and make its interference depend upon the character and conduct of the moving party in no way affecting the equitable rights which he asserts against the defendant. But, if the rights he asserts, and for the protection of which he asks the interposition of the equitable power of the court, are in themselves essentially illegal, or a violation of law, then his prayer will be refused, and he will be left to the ordinary legal remedies, and will not receive any benefit from the equitable powers of a court of justice. Pom. Eq. Jur. § 397 et seq. That is precisely this case. This plaintiff, according to the testimony made to appear upon this

record, is persistently and flagrantly using these premises for a disorderly house, in violation of the statute. He asks the help of the equitable power of the court practically for the purpose of permitting him to continue that violation of the law. It is apparent that an injunction could have no other effect, and that, just so soon as the observation and inspection of the police was withdrawn from this place, this gambling house would be re-opened, to the scandal and inconvenience of the neighborhood. A court of equity will not permit its process to be perverted to any such purpose. Assume that the legal rights of this plaintiff are being infringed. If that be true, he must enforce them by the proper proceedings at law, and, if he can do so, undoubtedly his rights will be protected, or he will be compensated for any violation of them; but, if the law affords him no protection, equity will certainly not help him by putting its hand upon the officers of the law who are seeking to perform their duty, although possibly in a manner oppressive to this plaintiff, and restraining them for no other purpose than that this man may go on with his violations of the law unmolested and unwhipped of justice. If the defendant is violating the law, undoubtedly the law will afford some way for preventing his action, or punishing him if he does it. The plaintiff is clearly doing so in respect of the very matter and for the benefit of the very premises as to which he asks an injunction. For that reason he will receive no aid from the equitable side of the court, but must be left to whatever remedy the law affords him in the matter.

In *P., C., C. & St. L. Ry. Co. v. Crothersville*, 159 Ind. 330, the railroad company had maintained certain stock pens in the municipality, which the Board

of Health had declared a public nuisance and ordered removed and later threatened their removal. A bill was filed to enjoin the threatened removal of the stock pens, and, regardless of the merits of the case, it was dismissed on the ground that the railroad company, in maintaining the public nuisance, had no standing in a court of equity to enjoin the action of the board. The Supreme Court of Indiana, in affirming the decree of dismissal, said (337):

It is a well settled maxim, that he who comes into equity must come with clean hands. Here appellant, under the facts found, seeks the aid of equity to enjoin the appellees from abating a public nuisance maintained by it, on the ground that they have no right to abate it. To grant such relief to appellant, who is maintaining the public nuisance, would be contrary to the well settled principles of equity. Fetter, *Equity*, 37-40; Bispham, *Prin. of Eq.* (6th ed.), 61, 62, 63; 1 *Spelling, Inj. and other Extr. Rem.* (2d ed.), § 26; 11 *Am. & Eng. Ency. Law* (2d ed.), 162, 163; *Albertson v. Laughlin*, 173 Pa. St. 525, 34 Atl. 216, 51 Am. St. 777; *Unckles v. Colgate*, 148 N. Y. 529, 43 N. E. 59; *Cassady v. Cavenor*, 37 Iowa 300; *Central Trust Co. v. Wabash, etc., R. Co.*, 25 Fed. 1; *Fairfield Floral Co. v. Bradbury*, 89 Fed. 393; *Board, etc. v. O'Dell, etc., Co.*, 115 Fed. 574.

To grant appellant the relief prayed for under the facts found would be to aid in maintaining a public nuisance, a crime under the laws of this State.

The action of the Commerce Court in destroying the order of the Interstate Commerce Commission, and the affirmance of the judgment by this court, would put a sanction upon and would legalize these

illegal arrangements between railroads and Arbuckle Bros., which ought not and will not prevail.

At once it gets within the power of interstate carriers to set at naught the regulating statute by making arrangements with large corporations and combinations, such as exist here in and by which they turn over to them the freight terminals to be operated as a part of the industry or business of the corporation or combination.

FILED.

DEC 23 1912

JAMES H. MCKENN

In Equity, No. ~~com~~ 385

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

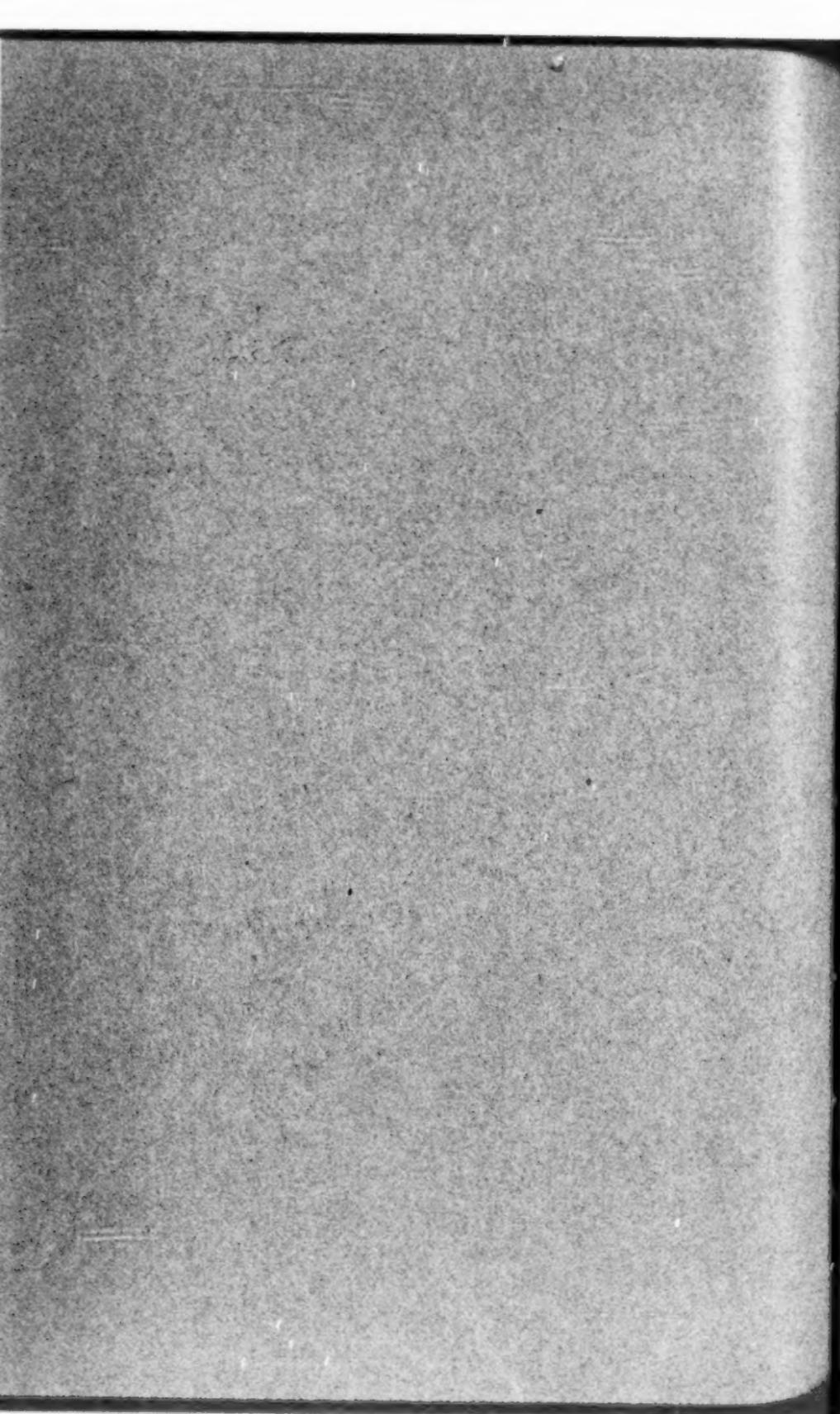
THE UNITED STATES, THE INTERSTATE COMMERCE
COMMISSION, AND THE FEDERAL SUGAR REFIN-
ING COMPANY, APPELLANTS,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, THE
CENTRAL RAILROAD COMPANY OF NEW JERSEY
ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
Solicitor.



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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, THE INTERSTATE
Commerce Commission, and the Fed-
eral Sugar Refining Company, appellees,
v.
THE BALTIMORE & OHIO RAILROAD
Company, The Central Railroad Com-
pany of New Jersey, et al., appellants. }
In Equity,
No. 862.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This case comes here by appeal from a final decree of the Commerce Court, enjoining enforcement of an order of the Interstate Commerce Commission dated December 5, 1910, the body of which reads:

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above-named defendants to Arbuckle

Brothers on their sugar brought by them on floats from [or on] lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complaints [complainants] and unduly prefer said Arbuckle Brothers, in violation of the act to regulate commerce.

It is ordered, That the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce.

(Rec., 66-67.)

The real question for determination, as we view this controversy, may be stated in a few words: May the carriers who transport freight traffic in a westerly direction from New York Harbor points, by entering into an agreement with some of the largest shippers of sugar, which, in tonnage, constitutes about one-third of that traffic, ostensibly for the purpose of providing terminal facilities in Brooklyn for the accommodation of the general public,

accord to such shippers rates which, in reality, when considered as a net proposition, are materially less than the rates contemporaneously exacted by the carriers from another shipper, in cases where, in each instance, the services performed by the carriers pertain to sugar shipped over the same lines of railway, in the same direction, and between the same points; that is to say, may the carriers give to Arbuckle Brothers rates which are less in each instance than the rates they contemporaneously exact from the Federal Sugar Refining Company for the transportation of sugar over the carriers' lines of railway from the Jersey shore to western points of destination?

The order of the Commission was made under circumstances and conditions which may be stated as follows:

On or about October 1, 1909, the appellant, the Federal Sugar Refining Company, instituted a proceeding before the Commission by filing in the Commission's office a complaint against the carriers who are appellees herein. Said proceeding is numbered 2888 on the Commission's docket. The complaint was, in substance, that the carriers were violating sections 1, 2, and 3 of the act to regulate commerce by paying on interstate shipments of sugar shipped over the carriers' lines by Arbuckle Brothers, a firm composed of John Arbuckle and William A. Jamison, an allowance of 3 cents per 100 pounds where the shipments were destined to the carriers' western termini or points east thereof, and

an allowance of 4½ cents per 100 pounds where the shipments were destined to points west of said western termini, and refusing to pay either like allowances or any allowances at all on similar shipments shipped over the carriers' lines by said complainant. (Rec., 39.)

After full hearing and investigation had and after the case had been fully argued by counsel for the parties the Commission made a report, in which it said:

Among the several corporations and copartnerships engaged in the refining of sugar in and about the harbor of New York City the only ones that we are concerned with at this time are the complainant and a copartnership widely known as Arbuckle Brothers, which owns an extensive property at the foot of Bridge Street in the city of Brooklyn having a frontage of 1,200 feet on East River and locally known among the shippers that use it as the Jay Street Terminal of the defendants. For that use of the dock and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from 3 to 4½ cents per 100 pounds on all merchandise passing through the terminal, whether inbound or outbound. The floats and barges used in this service are owned by Arbuckle Brothers and all persons employed in the handling of the freight, on the water as well as on the dock, are on the pay rolls of that firm.

The property immediately adjoining the dock property is also owned by Arbuckle Brothers, and on it they have erected a large sugar-refining plant. No less than one-third of all the merchandise handled through the dock by Arbuckle Brothers in their capacity, as is here contended, as agents of the defendants, is sugar manufactured and owned by Arbuckle Brothers in their capacity as refiners and shippers of sugar. As shippers Arbuckle Brothers daily deliver at the Jay Street Terminal a large tonnage of refined sugar for carriage to various interstate points of consumption. It is contended here that they receive their own sugar on their own dock as agents of the defendant carriers. In lighters or on floats, owned by them, but which, it is claimed, they operate as agents of the defendants, they carry their own sugar thence to the regular freight-receiving stations at the rail ends of the defendants on the Jersey shore. On every 100 pounds of sugar thus delivered at the Jay Street Terminal by Arbuckle Brothers, as shippers, to Arbuckle Brothers, as agents of the defendant carriers, and lightered by them in the latter capacity, as is contended, across the river to the defendants' depots, Arbuckle Brothers receive, as heretofore stated, an allowance of from 3 to 4½ cents. They receive similar allowances on the merchandise of other shippers handled through the Jay Street Terminal in the same manner. It may be well here to add that the defendants assert that the Jay Street Dock was made a railroad terminal in order to provide a freight

station for the shipments of manufacturers and merchants in Brooklyn who have no dock of their own. And it is true that a substantial tonnage, said to be about two-thirds of the total tonnage now passing through the terminal, is of that character.

The complainant, the Federal Sugar Refining Company, is also a refiner of sugar and competes with Arbuckle Brothers in supplying that commodity to consumers in the inter-state communities reached by the defendants and their connections. Its refinery is located at Yonkers. Adjacent to and connected with it the complainant owns a pier or dock. Yonkers, however, is outside the lighterage limits established by the defendants in New York Bay and the two rivers, which together form what we have referred to as the harbor of New York; and the complainant therefore does not enjoy from its dock the benefit of the free-lighterage service offered by the defendants, under their tariffs, to shippers to and from piers that are within the limits. It is said that the complainant may reach the destinations in question, and in most instances at the same rates, by delivering its sugar to the New York Central at Yonkers, whence it can be carried to Sixtieth Street and floated across the harbor to the receiving stations of the defendants on the west side of the North River. It is asserted, however, and this we take to be established of record, that, for various reasons and because of delays in the handling of shipments, the complainant has found by actual experience that it can not

successfully meet the requirements of its patrons by using that route, and it has been compelled to find other means for delivering its refined sugar to the defendants at Jersey City. It has therefore entered into an arrangement with the Ben Franklin Transportation Company for lightering its sugar to the same freight depots of the defendants west of the river to which Arbuckle Brothers lighter their sugar.

* * * * *

Since its incorporation in 1907 the complainant has maintained its general offices at 138 Front Street, in the city of New York, where all its accounts and records are kept, except such as pertain to the actual operation of the refinery at Yonkers. Here its president and other executive officers and their subordinates are located and the actual business of the company is conducted. The only employees at the refinery are those engaged in the operation of the plant, including the superintendent, the checkers, weighers, samplers, shipping clerks, etc. The books kept at the refinery are tally books, weighers' books, samplers' books, records of meltings, and similar documents and papers that pertain to the actual conduct of the refinery. The records of the financial operations of the company, the sales of its products, and all its general correspondence are kept at the general offices.

For fifteen years the Ben Franklin Transportation Company has been a lessee of a portion of Pier 24, in North River, at the foot of Franklin Street, the other portions of the

pier being rented to other water lines. It is an independent company engaged in a general lighterage and towing business on the Hudson River. It seems not to be affiliated, either in fact or in origin, with the complainant and to have no intercorporate relations with it. One of its officers is said to own 10 shares of the common stock and 170 shares of the preferred stock of the complainant company. With that exception, which may be disregarded as having no significance, the only relation between the two enterprises rests on the contract between them, under which the transportation company undertakes to lighter the sugar of the complainant, first to Pier 24 and thence, as it may be directed, to the Jersey City terminals of the defendants and to receiving stations of other water and rail lines. This work is carried on by it substantially as follows:

A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has the sugar ready at the stringpiece, and it is loaded into the lighter by employes of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight

and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock, and notice of its arrival is given at the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar upon the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depot on the Jersey side and there makes delivery of its cargo by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman.

For its services in taking the sugar first to Pier 24 and then, after receiving instructions and the bills of lading, in carrying it across the river and making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds. As Arbuckle Brothers receive from the defendant carriers an allowance of from 3 to 4½ cents per 100 pounds upon delivering their sugar across the river at the same freight depots, the complainant contends that the defendant carriers subject it to an unlawful discrimination when they decline to make it similar allowances for delivering its sugar to the defendants at the same place and

in the same manner. That is the point of controversy to which our attention has been directed in both these proceedings. On the record in the former proceeding, as heretofore explained, it appeared that the lighterage movement commenced at Yonkers, which is outside the lighterage limits. On the record now before us the complainant contends that the lighterage movement to the receiving stations west of the river commences at Pier 24, where the complainant gives its shipping instructions to the lighterage company. Without entering here upon any discussion of the importance of the fact in the disposition of this proceeding, it will suffice to say that we accept the complainant's contention that the sugar is now being lightered to the defendants at Jersey City from Pier 24, which is inside the lighterage limits. The lighter is actually made fast to that pier when it arrives from Yonkers; sometimes a portion of its cargo is discharged there and held in storage, presumably for local use; the lighterman has no authority to go farther for any instructions for a further movement, and must wait there for authority and instructions; upon receiving orders he lighters the cargo as directed, sometimes to one station and sometimes to another, the cargo not infrequently being divided among the several receiving stations across the river, or being delivered to water lines or railroads other than the defendants, all in accordance with the instructions received at Pier 24.

The one fact that stands out prominently upon this statement of the case is that it costs

the complainant 3 cents per 100 pounds to tender its sugar to the defendants at their regular receiving stations on the Jersey shore, being the points where the actual rail transportation begins, while the defendants relieve Arbuckle Brothers of any such expense by paying them the ample allowances heretofore mentioned. Around this fact the whole controversy turns. As manufacturers and shippers of sugar, the complainant and Arbuckle Brothers are competitors in the markets reached by the defendants * * *

* * * In the past, as we know from various investigations and from an examination of old tariffs, Havemeyer & Elder, the predecessors of the American Sugar Refining Company, the dock of which is also involved in this proceeding, for many years enjoyed illegal preferences at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries these allowances were extended to them, apparently under some sort of verbal arrangement. It was not until after the enactment of the so-called Elkins law that the lighterage allowances on sugar from the Arbuckle piers seem to have been published. They were then limited to sugar and coffee, being the commodities in which Arbuckle Brothers were interested; and they were paid, as the tariff states, "on account of the peculiar physical situation at the water front adjacent to the Arbuckle refinery," a statement that has not been satisfactorily explained to the Commission, although commented upon at the hearing.

The allowances at both piers seem, therefore, to have had their origin in an unlawful preference of these great shippers. Apparently it was not until some years afterwards that the two piers were made public receiving stations of the defendant carriers * * *.

It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic. As is pointed out in the dissenting opinion in the first of these proceedings (17 I. C. C. Rep., at p. 51), an instance of this nature was developed in the investigation entitled "In the matter of allowances for transfer of sugar" (14 I. C. C. Rep., 619). It appeared in the course of that inquiry that the Pennsylvania Railroad Company has a wharf in Brooklyn immediately adjoining the Brooklyn Eastern District terminal, a property of the Havemeyers, who were said to be closely affiliated with the American Sugar Refining Company. This dock will be considered later in this report. It will suffice at this point to say that in the investigation referred to the freight-traffic manager of the Pennsylvania Railroad Company frankly admitted that his company, notwithstanding the proximity of its own dock, had made the Brooklyn Eastern District Terminal its terminal also, and in order to get a share of the sugar tonnage of the Havemeyer refinery had agreed to pay lighterage allowances on sugar shipped from that dock. Defining the transaction in the plainest terms, the Pennsylvania Railroad Company simply purchased its part

of the traffic of that very extensive shipper; and in view of the allowances then being made by other carriers, it could get a portion of the tonnage in no other way. This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly established by the records of the Commission, namely, that the allowances were originally extended to these large shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated in the published tariffs of the defendants as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them.

* * * It is impossible to conclude on all the information before us that these continued relations between the defendant carriers and great shippers and interests closely allied and largely identified with great shippers are wholly disinterested, however much of a convenience the docks may now be to some of the general shipping public.

* * * The defendants decline to reimburse the complainant for the cost of delivering its sugar at the same receiving stations under substantially similar conditions. (Rec., 44-51.)

The complainant contends that in lightering their sugar to the Jersey shore and there

delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle the sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employees that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants with respect to the sugar of Arbuckle Brothers until the defendants have actually received it at their regular freight-stations west of the river. Yet it is here contended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled, however, by the face of those documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers if, as seems to be abundantly clear upon a reading of their provisions, the real and actual relation of

Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers * * *. (Rec., 52-53.)

* * * It is not necessary, however, to draw fine distinction between an accessorial service and a service of transportation as applied to the facts in this case. If the allowances made by the defendants subject the complainant to an undue discrimination, or give Arbuckle Brothers, their competitors, an unjust preference, a wrong is being done that must be redressed by an appropriate order, whether the allowances are paid as for an accessorial service or for a service of transportation * * *. (Rec., 54-55.)

* * * And we find that the terms under which the defendant carriers accept the sugar of Arbuckle Brothers at their regular stations west of the river do result in inequalities, preferences and discriminations, and are unduly and unjustly prejudicial to the rights of the complainant as a shipper of sugar over the lines of the defendants in competition with

Arbuckle Brothers in the same markets. (Rec., 57.)

The sugar of the two competing shippers gets into the actual physical possession of the defendants on the Jersey shore under practically similar conditions, and if, as the defendants contend, the Arbuckle sugar commences to move at the Arbuckle dock, it must be remembered that the defendants also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If, then, the defendants permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the defendants under their tariffs, it is difficult to see upon what theory the defendants may defend their refusal to recognize the lighters hired by the complainant as its facilities in performing for the defendants a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers, for a service of transportation alleged to be performed by them for the defendants with their own facilities, creates a present actual and substantial inequality that is unlawful under the act when similar allowances are refused to the other and competing shipper for an exactly similar service. * * *. (Rec., 58-59.)

* * *. We shall not undertake at this time to consider what rate question or other

problem might be presented if the defendants should buy or lease and operate the Jay Street Terminal for themselves and perform the lighterage to and from that terminal with their own equipment and with their own employees. If the present allowances paid to Arbuckle Brothers are a fair measure of what it would really cost the defendants to put the Arbuckle sugar on the Jersey side with their own equipment, the question might arise as to the reasonableness, from the standpoint of these competing refineries, of having identical rates on sugar from both sides of the river. But no such question is before us at this time.

On the whole record we hold that when the complainant, as hereinbefore described, tenders its sugar to the defendants on lighters at their regular receiving stations on the Jersey shore it must be received and carried thence to destination on rates, terms, and conditions that are no less favorable to the complainant in any particular than the rates, terms, and conditions governing and surrounding the sugar traffic of Arbuckle Brothers brought by them on floats and lighters to the same stations for carriage to the same destination. (Rec., 59.)

In the month of May, 1907, the Federal Sugar Refining Company of Yonkers, predecessor of the Federal Sugar Refining Company, appellant herein, instituted a proceeding before the Commission by filing a complaint in the Commission's office against the carriers who are appellees herein, and in said complaint

alleged that said complainant, through the Ben Franklin Transportation Company, performed the same service on its shipments of sugar as were performed by the American Sugar Refining Company through the Brooklyn Eastern District Terminal and by Arbuckle Brothers through the Jay Street Terminal; that the lighterage limits prescribed by said carriers were unduly discriminatory in that they did not extend to Yonkers and include the refinery of said complainant, and in that they permitted allowances to be made on shipments of sugar from the refineries of Arbuckle Brothers and the American Sugar Refining Company while not so permitting on the shipments of said complainant, and also alleged that said practice resulted in unjust discrimination and undue prejudice. Said proceeding is numbered 1082 on the Commission's docket.

After full hearing and investigation had the Commission dismissed by a four-to-three decision *without prejudice* said complaint, upon the ground that failure to include Yonkers within the lighterage limits did not constitute unjust discrimination. In this connection the Commission, in the majority report, said:

* * * All we hold is that by establishing a lighterage service in New York Harbor defendants incurred no liability, under the act to regulate commerce, to extend that service to Yonkers or other near-by communities, for the obvious reason that defendants have made themselves carriers by their own lines to New York, but have not assumed, and can not be

required by this Commission to assume, any such obligation in respect of Yonkers. (Rec., 29.)

Three members of the Commission dissented upon the ground that the matters complained of constituted an unjust preference and undue discrimination (Rec., 33-37), and one member of the Commission who joined in the majority report stated his reasons for doing so as follows:

I agree fully with the views of the majority on the question of extending defendant's lighterage limits so as to include Yonkers. I agree also with the conclusion of the majority report to the effect that defendants should not be required to pay complainant for lighterage its sugar to defendants' terminals in the lighterage limits. I base that view, however, upon the fact that complainant's factory is outside the lighterage limits, and that, therefore, no obligation rests upon the defendants to either go and get complainant's shipments or hire another to perform that service. In my opinion if the complainant were located within the lighterage limits the defendants could not lawfully permit complainant's competitors to lighter their sugar and receive pay for that service and refuse to permit complainant to lighter its sugar and receive the same compensation for that service.

It is not enough to say that because the Jay Street Terminal as a whole yields small dividends Arbuckle, as the owner of the Jay Street Terminal, receives no profit from the lighterage of Arbuckle's sugar. The whole

plant might be run at a loss and still there might be an abnormal profit in the lighterage of sugar. It is all a question of fact and of bookkeeping.

I think, therefore, unjust discrimination would necessarily exist if defendants permitted one sugar shipper within the lighterage limits to lighter his sugar and receive pay for that service and refused the same privilege and compensation to another sugar shipper also located within the lighterage limits. It might be that one such shipper would make a profit out of such allowance and that another shipper would not, just as one may make more profit than the other from the manufacture of the sugar. That, however, is a question of business ability, management, or advantage which neither the carriers nor this Commission has any right to undertake to adjust or equalize. (Rec., 32-33.)

Aside from conclusions, the allegations of fact contained in the petition of the carriers (Rec., 1-14), and in the petitions of the intervening petitioners (Rec., 69-83, 85-97), are, in substance, the same as the facts reported by the Commission as aforesaid, but the appellees deny the correctness of the Commission's conclusions of law and of fact. (Rec., 10-13, 77-78, 96.)

After the petition of the carriers was filed the appellants herein filed motions to dismiss same for insufficiency in accordance with provision therefor made in section 1 of the Commerce Court act of June 18, 1910, and after John Arbuckle and William A. Jamison and the Brooklyn Eastern District Terminal

filed intervening petitions and were granted permission to intervene, the motions to dismiss were, by order of the Commerce Court upon application, extended so as to cover the intervening petitions. (Rec., 100-101.)

The cause was heard by the Commerce Court upon motions of the petitioners and intervening petitioners for a temporary injunction, upon pleadings and affidavits filed in support of the motion, and upon said motions to dismiss. (Rec., 101-103.)

After the case was argued orally before the Commerce Court, that court entered an interlocutory decree, granting a preliminary injunction, from which an appeal was taken to this court, but the case was afterwards remanded for further proceedings, this court having held that in issuing the preliminary injunction the Commerce Court had not exercised improperly the authority conferred upon it by section 3 of the Commerce Court act of June 18, 1910.

Thereafter final hearing was had in the Commerce Court upon motions to dismiss the petition and intervening petitions for want of equity, filed by the United States, respondent, and the Interstate Commerce Commission and Federal Sugar Refining Company, intervening respondents, who elected to stand upon said motions after they had been overruled by the court, whereupon the court entered the final decree from which appeal was taken to this court as aforesaid.

The errors assigned and relied upon are thirteen in number (Rec., 125-128), and are to the effect that there is no equity in the petitions and that, therefore, the Commerce Court erred in enjoining enforcement of and setting aside the order of the Commission.

POINTS.

I.

THE COURT ERRED IN NOT DISMISSING THE PETITIONS FOR WANT OF EQUITY.

Concerning the regularity of the proceedings before the Commission and the Commission's jurisdiction in the premises there is no controversy whatever. It is admitted, at least it is not denied, that the Commission had jurisdiction over the parties in the proceeding before it and over the subject matter of controversy in that proceeding, and it is not claimed either that the Commission failed to give a full hearing to the carriers named in the order here in question or that the order was not served upon the carriers in accordance with the provisions of the act to regulate commerce.

Under these circumstances the natural inquiry is, What question of importance was presented to the Commerce Court for determination? These appellants answered that question by filing motions to dismiss, upon the ground that the allegations contained in the petitions of the appellees did not constitute a cause of action or make a case which entitled the appellees to the relief or any of the relief asked for by them.

When the petitions were filed in the Commerce Court the appellants believed that the matters set forth therein were not sufficient to justify any interference by the court with the order of the Commission, but, because of matters which will be referred to briefly in detail, counsel for the appellees contended to the contrary, and the views of the latter were, apparently, believed to be correct and accepted and adopted by the Commerce Court.

The carriers have established one rate for the transportation by rail from the Jersey shore and another rate for the transportation by water and rail from the harbor points (Rec., 59), and while in amount the former rate is the same as the latter, the rate from the harbor points includes a service not included in the rate from the Jersey shore. In other words, while the latter rate includes only the service of transportation by rail from the Jersey shore, the rate applicable to the harbor points in New York covers such rail transportation and in addition thereto another service which is described in the tariffs of the carriers as a free-lighterage service; that is, transportation by water from the harbor points in New York to the Jersey shore.

The carriers have also published and filed tariffs wherein and whereby they have established a lighterage zone in New York Harbor, which includes the Jay Street Terminal and the Brooklyn Eastern District Terminal, in Brooklyn, and Pier 24 in New York City, but does not include the city of Yonkers. (Rec., 2-3.)

John Arbuckle and William A. Jamison, under the firm name of Arbuckle Brothers, manufacture sugar at their plant, which is located immediately adjacent to the Jay Street Terminal, and they ship the sugar through said terminal over the rail lines of said carriers from the termini of the carriers on the Jersey shore to western points of destination. The sugar is transported to said termini from said terminal by Arbuckle Brothers on their own floats and lighters, which are operated by their own employees.

The Federal Sugar Refining Company manufactures sugar at its plant, which is located at the city of Yonkers, and ships the sugar over the rail lines of the carriers from their said termini on the Jersey shore to said western points of destination. The sugar is transported from Yonkers by the Ben Franklin Transportation Company, on floats and lighters owned and operated by it, to said Pier 24, and afterwards to the carriers' said termini on the Jersey shore; and for such transportation services the Ben Franklin Transportation Company is paid by the Federal Sugar Refining Company.

On each of the shipments made by Arbuckle Brothers as aforesaid the carriers pay an allowance of 3 cents per 100 pounds, where the destination of the shipment is a point at or east of the carriers' western termini, and of $4\frac{1}{2}$ cents per 100 pounds, where the destination of the shipment is a point west of said western termini, but they do not pay either like allowances or any allowances at all on the sugar

shipped by the Federal Sugar Refining Company as aforesaid.

In consequence of this discrimination the net amount of transportation charges paid by Arbuckle Brothers to the carriers for the transportation of their sugar over the carriers' lines from the Jersey shore to said western points of destination is in each instance less per 100 pounds to the extent of the allowance paid than the net amount of transportation charges paid by the Federal Sugar Refining Company to the carriers for the transportation of its sugar over the same lines of railway in the same direction and between the same points of origin and destination.

Also, as a result of said discrimination, the Federal Sugar Refining Company, in competing with Arbuckle Brothers in the sale of sugar at said western points of destination, is, in each instance, handicapped to the full extent of the allowance paid to Arbuckle Brothers as aforesaid.

The Commission, as above shown, concluded that this discrimination was undue, and by the order here involved required the carriers to remove it.

However, it is said that the conclusion of the Commission is, as a matter of law, untenable, because: (1) In receiving their shipments of sugar at the Jay Street Terminal and in transporting them therefrom to the Jersey shore Arbuckle and Jamison operate under the name of Jay Street Terminal and as agents of the carriers, and issue bills of lading which render the carriers liable to the consignees named therein for any loss of or damage to the shipments which may

occur after such receipt. (2) A very large portion of the sugar shipped by Arbuckle and Jamison is sold by them f. o. b. Brooklyn. (3) Allowances pertaining to the shipments of Arbuckle Brothers are paid in accordance with tariffs published and filed by the carriers and in accordance with contracts entered into by and between the carriers and the Jay Street Terminal, and cover the use of said terminal and all services connected with the receipt of said shipments as well as the transportation thereof from said terminal to the Jersey shore. (4) The contracts are not confined to Arbuckle Brothers' shipments of sugar; they cover also other traffic shipped by and consigned to members of the general public other than Arbuckle Brothers and transported over the carriers' lines of railway, and the allowances paid by the carriers on Arbuckle Brothers' shipments of sugar are, with only a few exceptions, the same as the allowances paid by the carriers on other traffic shipped from and destined to the Jay Street Terminal and transported over the carriers' lines of railway. (5) Bills of lading issued by the carriers, which pertain to the Federal Sugar Refining Company's shipments of sugar, show that said shipments are received for transportation by the carriers on the Jersey shore. (6) The Federal Sugar Refining Company's shipments originate at Yonkers, and the practice of shipping therefrom to Pier 24 and afterwards reshipping from Pier 24 to the Jersey shore is indulged in for the purpose of showing delivery to the carriers on the Jersey shore of shipments

which originate at a point within said free-lighterage limits. (7) The carriers are now and always have been ready and willing to accept the shipments of the Federal Sugar Refining Company at any point within said lighterage limits and lighter them therefrom to the Jersey shore at their own expense, as in and by the tariffs published and filed by them they have advertised to do.

It will thus be seen that the contention of the appellees is, not that the discrimination referred to does not in fact exist, but that it results from matters which make the circumstances and conditions under which the shipments of Arbuckle Brothers are transported by the carriers substantially dissimilar from the circumstances and conditions under which the carriers transport the shipments of the Federal Sugar Refining Company.

(1) THE COMMISSION CORRECTLY TREATED AS ONE AND THE SAME CONCERN THE FIRM OF ARBUCKLE BROTHERS AND THE FIRM STYLED JAY STREET TERMINAL.

It is admitted that John Arbuckle and William A. Jamison comprise the firm of Arbuckle Brothers, and that they are the only members of the firm styled Jay Street Terminal. Also, as stated above, the Commission found that the floats and barges used in transporting the shipments of Arbuckle Brothers from the Jay Street Terminal to the Jersey shore are owned by that firm, and that all persons employed in handling the shipments, on the water as well as at the Jay Street Terminal, are on the pay rolls of Arbuckle

Brothers (Rec., 45), and it will be observed that the correctness of those findings is not denied by the appellees. We therefore think pointing out that Arbuckle and Jamison manufacture and ship sugar under one firm name and receive the sugar at the Jay Street Terminal and transport it therefrom to the Jersey shore under another firm name resembles an attempt to make a distinction where no difference in substance exists, and this was the conclusion of the Commerce Court.

The claim that in handling the shipments of Arbuckle and Jamison at the Jay Street Terminal, and in transporting the shipments from said terminal to the Jersey shore, Arbuckle and Jamison act as agents of the carriers is of like character and is in conflict with the admitted facts.

We have seen that Arbuckle and Jamison own the Jay Street Terminal and all instrumentalities used in operating it as well as the instrumentalities used in transporting their shipments therefrom to the Jersey shore, and that their employees perform all services connected with such operation and transportation. It is also true, as shown by Exhibit A to the petition of the carriers (Rec., 80-81), that Arbuckle and Jamison, under the name of Jay Street Terminal, are responsible for all loss of or damage to said shipments which occurs prior to the time when the shipments are delivered to the carriers on the Jersey shore, and are also responsible to the carriers for all claims, injuries, or damages arising under bills of lading issued by the Jay Street Terminal in the names of the

carriers. So far, therefore, as the shipments of Arbuckle Brothers are concerned there appears to be nothing left of the agency referred to except the name. The liability of the carriers under the bills of lading is merged in the liability assumed by Arbuckle and Jamison, under the name of Jay Street Terminal, in said contracts.

(2) THE FACT THAT A LARGE PART OF ARBUCKLE BROTHERS' SUGAR IS SOLD F. O. B. BROOKLYN IS A MATTER OF NO IMPORTANCE.

Under the circumstances above set forth it is clear that the question of whether Arbuckle Brothers sell their sugar f. o. b. Brooklyn is of no consequence whatever. It will be observed that, regardless of the answer to that question, they receive, under the name of Jay Street Terminal, the allowances paid by the carriers, and in both cases Arbuckle Brothers are the shippers.

(3) SHOWING THAT THE ALLOWANCES ARE PAID TO ARBUCKLE BROTHERS IN ACCORDANCE WITH TARIFFS PUBLISHED AND CONTRACTS ENTERED INTO BY THE CARRIERS, AND THAT THE ALLOWANCES COVER USE OF THE JAY STREET TERMINAL AND ALL SERVICES PERFORMED THERE IN CONNECTION WITH THE TRANSPORTATION OF THE SHIPMENTS, DOES NOT CHANGE THE CHARACTER OF THE DISCRIMINATION.

It may be that the discrimination is practiced in accordance with the tariffs published and filed by the carriers and in accordance with the terms of the contracts above mentioned, but we fail to see wherein it is thus rendered less unjust than it would be otherwise. It is apparent that the preference given to Arbuckle Brothers and the prejudice to which the

Federal Sugar Refining Company is subjected are as injurious in their effect upon the latter company, and as great, as they would be if the allowances referred to were paid by the carriers without tariff or contract authority of any kind.

However, it is said that the allowances paid on the Arbuckle Brothers' shipments cover services of a character not performed, and the use of some instrumentalities not furnished, by the Federal Sugar Refining Company; and in this connection attention is called to the terms of said contracts, which provide that the allowances paid shall include, not only the services performed, and the use of the instrumentalities furnished, in connection with the transportation of the shipments of Arbuckle Brothers from the Jay Street Terminal to the Jersey shore, but also the use of said terminal as a place where the shipments may be delivered for transportation and the services performed in connection with them after such delivery and before the transportation of the shipments to the Jersey shore begins.

It is true that Arbuckle and Jamison furnish a place within said lighterage limits, namely, the Jay Street Terminal, where their shipments are handled prior to the time when the transportation of the shipments to the Jersey shore begins and also furnish all instrumentalities used in said transportation, free of expense to the carriers, and perform, or cause to be performed, without expense to the carriers, all services connected with such handling and transportation; but the Federal Sugar Refining Company furnishes

a place within said lighterage limits, namely, Pier 24, where their shipments are handled prior to the time when the transportation of the shipments to the Jersey shore begins and also furnishes all instrumentalities used in said transportation, free of expense to the carriers, and performs, or causes to be performed, without expense to the carriers, all services connected with such handling and transportation. We are therefore unable to see how it can be consistently claimed that the allowances paid on the shipments of Arbuckle Brothers cover services of a character not performed, or instrumentalities not furnished, in connection with its shipments, by the Federal Sugar Refining Company. The expense to the carriers of the transportation services performed by them is the same in each instance, regardless of whether such services pertain to the shipments of Arbuckle Brothers or to the shipments of the Federal Sugar Refining Company.

(4) BY CONFUSING ALLOWANCES PAID TO ARBUCKLE BROTHERS ON THEIR SHIPMENTS OF SUGAR WITH ALLOWANCES PAID TO THEM ON OTHER SHIPMENTS, THE CARRIERS CAN NOT MAKE LAWFUL A DISCRIMINATION WHICH WOULD OTHERWISE BE UNLAWFUL.

The fact that the allowances paid by the carriers on the shipments of Arbuckle Brothers are, with only a few exceptions, the same as the allowances so paid on other traffic shipped by and consigned to members of the general public other than Arbuckle Brothers is a matter of no importance. Sugar is the only traffic to which the order of the Commission applies, and the record shows that in the proceedings before the Commission, upon which the order is based, a dis-

crimination pertaining to the transportation of sugar was the only matter complained of. (Rec., 37-40.) The validity of an order based upon a discrimination complained of and held by the Commission to be unlawful does not depend upon the lawfulness of another matter concerning which no complaint is made; and this is especially true where, as in this case, no attempt has been made to show that such other matter constitutes either an unjust discrimination or other violation of the act.

In this connection his honor, Judge Mack, in his dissenting opinion said:

Can parties guilty of what would otherwise be an unjust discrimination escape the consequences of their act by combining the payment for the transportation service with payment for other work that in and of itself has no necessary connection therewith?

That Arbuckle Brothers run a public wharf as agents of the railroad companies, that their compensation is a combination of rent and wages as terminal managers and transporters, that the amount paid per 100 pounds of sugar may be far beyond a fair payment for that particular service, and may be made so because a similar payment per 100 pounds may be far below a fair payment for similar services as to other goods, do not, in my judgment, necessarily render the circumstances surrounding the transportation of the sugar to Jersey City so dissimilar from those at Pier 24 as to justify this court in holding that the Commission, in the reasonable exercise of its powers, could not

find that an unjust discrimination resulted from the payment to Arbuckle Brothers and the refusal to make a similar payment to the Federal Company. If the Commission could reasonably so find, its orders can not be annulled merely because the members of this court might have reached a different conclusion had they been acting as commissioners.

The fact that the contracts between the Jay Street Terminal and the railroads, by which the Arbuckle private docks were made public terminal stations and these allowances were definitely fixed, were made during the session of Congress which enacted the Hepburn Act, a law which aimed more effectively to prevent certain illegal practices theretofore secretly indulged in for the benefit of large and favored shippers, and the further fact that the ultimate destination of the goods determined the rate of payment, although the services in each case were absolutely identical, lends support to the conclusions of the Commission that the allowances are a mere disguise to conceal unjustly discriminatory and therefore illegal payments. (Rec., 122-123.)

(5) THE FACT THAT BILLS OF LADING ISSUED BY THE CARRIERS SHOW THAT THEIR RESPONSIBILITY FOR THE FEDERAL SUGAR REFINING COMPANY SHIPMENTS BEGINS AT THE JERSEY SHORE IS NOT, AS BETWEEN SUCH SHIPMENTS AND THOSE OF ARBUCKLE BROTHERS, A MATTER OF IMPORTANCE.

Bills of lading issued by the carriers, which pertain to the Federal Sugar Refining Company's shipments of sugar, show that said shipments are received for transportation by the carriers on the Jer-

sey shore, but that circumstance does not in any way tend to mitigate the discrimination referred to; it simply establishes that the risk assumed by the Federal Sugar Refining Company in connection with its shipments is the same as the risk assumed by Arbuckle and Jamison in connection with their shipments; and of course the risk assumed by the carriers is, in each instance, the same, regardless of the question of ownership.

(6) THE RIGHT OF THE CARRIERS TO DISCRIMINATE BETWEEN ARBUCKLE BROTHERS AND THE FEDERAL SUGAR REFINING COMPANY DOES NOT DEPEND UPON THE QUESTION OF WHETHER THE LATTER CHANGED ITS METHOD OF SHIPPING TO AVOID SUCH DISCRIMINATION.

The shipments of the Federal Sugar Refining Company which are delivered to the carriers on the Jersey shore do not originate at Yonkers, although the sugar included in those shipments does. In this connection it will be observed that the facts stated by the Commission in its report are the same in substance as the allegations contained in the petition of the carriers. (Rec., 7-8.) However, the former are more full and complete than the latter. Upon this point the Commission said:

A lighter reports every morning at the dock of the complainant at Yonkers and receives such sugar in barrels, boxes, or other packages as may be ready for shipment. The superintendent of the refinery, having been previously advised from the company's general offices in New York City of the quantity of sugar required in order to fill accepted contracts, has

the sugar ready at the stringpiece and it is loaded into the lighter by employees of the transportation company. The officer in charge of the lighter gives a receipt for the shipment and in return is handed a document showing the complainant as the consignor at Yonkers and the consignee at 138 Front Street. It also gives the contract numbers, together with the weight and description of the packages. The lighter then proceeds with its load to Pier 24, which, as heretofore stated, is within the lighterage limits. It is there made fast to the dock and notice of its arrival is given at the general offices of the complainant. Thereupon the complainant issues shipping instructions to the transportation company and hands to its representative a bill or bills of lading for execution by the defendant carriers upon the delivery of the sugar on the Jersey shore. Upon receiving these instructions and the bills of lading the lighter proceeds to the freight depots on the Jersey side and there makes delivery of its cargo by unloading the sugar upon the car platforms of the carrier or carriers named in the lading papers. The bills of lading are executed by the carriers and returned to the lighterman.

* * * The lighter is actually made fast to that pier when it arrives from Yonkers; sometimes a portion of its cargo is discharged there and held in storage, presumably for local use; the lighterman has no authority to go further for any instructions for a further movement, and must wait there for authority and

instructions; upon receiving orders he lighters the cargo as directed, sometimes to one station and sometimes to another, the cargo not infrequently being divided among the several receiving stations across the river, or being delivered to water lines or railroads other than the defendants, all in accordance with the instructions received at Pier 24. (Rec., 47-48.)

It will thus be seen that the transportation of the shipments which originate at Yonkers and all matters pertaining thereto become a thing of the past before the transportation from Pier 24 of the shipments which are delivered to the carriers on the Jersey shore begins. At the time the shipments start from Yonkers it is impossible for any one to know whether they will be forwarded to the Jersey shore or what their final destination will be. At that time the Federal Sugar Refining Company may have decided to forward the shipments over the carriers' lines of railway to western points of destination, but either before or after the shipments reach Pier 24 it may change its mind and either send them to other destinations or sell the sugar included in the shipments for local consumption in New York City.

However, it is said that the practice of shipping to and from Pier 24 is indulged in for the purpose of showing delivery to the carriers on the Jersey shore of shipments which originate at a point within said lighterage limits, and thus secure, under the rulings of the Commission, for the Federal Sugar Refining Company, advantages it could not otherwise obtain.

In the proceeding before the Commission, referred to herein as No. 1082, it was shown that the shipments of the Federal Sugar Refining Company were transported from Yonkers direct to the Jersey shore, and, as above shown, four members of the Commission concluded that the carriers were under no obligation to pay allowances for transportation outside the lighterage limits, while three members expressed the opinion that, regardless of the origin of the shipments, the discrimination practiced was unjust. One of the four, however, in stating the reasons which prompted him to concur in the majority opinion, said:

* * * In my opinion, if the complainant were located within the lighterage limits the defendants could not lawfully permit complainant's competitors to lighter their sugar and receive pay for that service and refuse to permit complainant to lighter its sugar and receive the same compensation for that service.

(Rec., 32-33.)

It may be true, therefore, that in deciding to locate its general offices in New York City and ship sugar from a point within said lighterage limits the Federal Sugar Refining Company was somewhat influenced by the above ruling of the Commission.

In its report in this case, though, five members of the Commission, in expressing their views upon the point under consideration, said:

* * * If the defendants accord Arbuckle Brothers the privilege of lighterizing their sugar from their dock and make them an allowance therefor we regard it as axiomatic, under the

principles of this legislation, that they must accord a like privilege and make a like allowance to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we have found that the complainant now lighters its sugar from Pier 24, which is within the lighterage limits. (Rec., 56.)

But whether the Federal Sugar Refining Company was or was not influenced as above suggested is a matter of no consequence whatever if we understand correctly a decision rendered by this court in what we regard as an analogous case.

In the case of *Gulf, Colorado & Santa Fe Railway Company v. Texas*, 204 U. S., 403, the question presented for determination was whether a carload of corn which originated at Hudson, S. Dak., and was transported from that point by railroad via Kansas City, Mo., and Texarkana, Tex., to Goldthwaite, Tex., was, while being transported from Texarkana to Goldthwaite, an "interstate" or an "intrastate" shipment, the materiality of an answer to that question being that the charges for transportation properly collectible would be greater if the shipment were interstate than if it were intrastate. The pertinent and material facts may be summarized as follows:

The Hardin Grain Company sold to Saylor and Burnett delivered at Goldthwaite some corn, and afterwards, for the purpose of filling the contract of sale, purchased from the Harroun Commission Company delivered at Texarkana the carload of corn above mentioned and some other corn. Said carload was shipped from Hudson to Texarkana under one bill of lading and from Texarkana to Goldthwaite under another bill of lading, but, without breakage of seals and without other interference with its contents, the car containing the corn was forwarded from Kansas City to Goldthwaite. At the time the Hardin Grain Company purchased said carload as aforesaid it intended to send it to Goldthwaite, and the reason why it purchased the corn delivered at Texarkana and had it reshipped from that point was because it wished to make the shipment from Texarkana to Goldthwaite intrastate and thus secure the advantage in transportation charges above mentioned. (Id., 404-408.)

Under these circumstances this court ruled that the intention of the Hardin Grain Company was a matter of no importance and held that the shipment delivered in Goldthwaite originated as a matter of law in Texarkana. (Id., 411-414.)

(7) THE CARRIERS' OFFER TO LIGHTER THE FEDERAL SUGAR REFINING COMPANY SHIPMENTS FROM PIER 24 TO THE JERSEY SHORE FREE OF EXPENSE TO THAT COMPANY DOES NOT CHANGE THE CHARACTER OF THE DISCRIMINATION WHICH FORMS THE BASIS OF THE COMMISSION'S ORDER.

The appellees say that the carriers are now and always have been ready and willing to accept delivery of the shipments of the Federal Sugar Refining Company at any point within the lighterage limits and lighter them therefrom to the Jersey shore at their own expense, and that, therefore, the findings of the Commission, that the discrimination in question is unjust and that it gives to Arbuckle and Jamison undue preference and advantage and subjects the Federal Sugar Refining Company to undue prejudice and disadvantage, are untenable.

We think this indicates that the appellees have misconceived the discrimination complained of by the Federal Sugar Refining Company and condemned by the Commission. The matter complained of was the payment of allowances to Arbuckle and Jamison on their shipments of sugar when delivered by them to the carriers on the Jersey shore and the carriers' refusal to pay to the Federal Sugar Refining Company like allowances on its shipments of sugar when delivered by it to the carriers on the Jersey shore, and it is apparent that this discrimination would not be removed even if the carriers accepted delivery of the Federal Sugar Refining Company's shipments at Pier 24 and lightered them therefrom at their own expense and with their own facilities and employees

to the Jersey shore, unless the carriers should discontinue payment of the allowances to Arbuckle and Jamison and accept delivery of the Arbuckle and Jamison shipments at the Jay Street Terminal or at some other point within the lighterage limits and transport them therefrom at their own expense and with their own facilities and employees to the Jersey shore.

In the dissenting opinion of Chairman Knapp (Rec., 60) it is said that upon the oral argument before the Commission counsel for the Federal Sugar Refining Company admitted that his client would not be benefited if the Jay Street Terminal were transferred to and operated by the carriers, and a similar statement is contained in the dissenting opinion of Commissioner Prouty. (Rec., 64.) This suggests the thought that the conclusions of the members of the Commission who dissented would be better supported by conditions which might be brought about by certain changes than they are by the conditions which actually exist at the present time.

However, the admission referred to could not so operate as to change the fact, and it is clear that the fact is in conflict with the admission.

We have seen (Rec., 26) that in most instances the rates of transportation on sugar to said western points of destination are the same from the Jersey shore as from Yonkers, notwithstanding that where the shipments of sugar are delivered to the New York Central & Hudson River R. R. Co. at Yonkers

for transportation they are redelivered in turn by that company to the carriers who are appellees herein, on the Jersey shore, for transportation therefrom to said western points of destination; but in such cases the sugar is not promptly transported from Yonkers to the Jersey shore, and the only reason why the Federal Sugar Refining Company lighters its sugar from Yonkers to the Jersey shore is to avoid the delay which would otherwise result and to enable it to compete successfully in the sale of sugar at said western points of destination with Arbuckle and Jamison, who also lighter their shipments of sugar to the Jersey shore.

This indicates the opinion of the Federal Sugar Refining Company concerning the value of the privilege of delivering shipments of sugar on the Jersey shore and also proves conclusively that the discrimination in question can not be removed unless the carriers can be compelled to give to the Federal Sugar Refining Company the same treatment they now accord to Arbuckle Brothers.

(8) THE LAWFULNESS OF THE DISCRIMINATION DOES NOT DEPEND UPON THE QUESTION OF WHETHER THE ALLOWANCES PAID TO ARBUCKLE BROTHERS ARE MORE THAN REASONABLE COMPENSATION FOR THE SERVICES PERFORMED BY THEM IN DELIVERING THEIR SHIPMENTS OF SUGAR ON THE JERSEY SHORE.

It is said that by the publication and filing of tariffs the carriers have obligated themselves to accept delivery of the shipments at any point within the lighterage limits and transport them therefrom to said western points of destination; that therefore

the transportation from the Jay Street Terminal to the Jersey shore is a part of the transportation which the carriers must perform for the New York rate, and that where carriers are under obligation to perform certain transportation services they may either perform those services themselves, or, under section 15 of the act, pay a shipper a reasonable compensation for doing so, regardless of how such an arrangement may affect another shipper. In other words, the carriers contend that they may pay one shipper an allowance for performing certain transportation services and refuse to pay another shipper a like allowance for the performance of a like service, under similar circumstances and conditions, because such employment is authorized, but not required, by law; and they contend that, for this reason, any discrimination which results from employment by them of one shipper and their refusal to employ another shipper can not be held to be unlawful, unless it be shown that the compensation paid to the shipper employed, when measured by the services performed therefor by the shipper, is unreasonable; and we understand this to be the opinion of the Commerce Court.

This is equivalent to saying that one provision of the act may be seized upon and used regardless of other provisions of the same act to justify inequalities in the treatment accorded by carriers to shippers, while this court, in speaking of the interstate commerce act as a whole, has repeatedly said

that it was enacted for the purpose of preventing such inequalities.

Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S., 263, 277.

Union Pacific Ry. Co. v. Goodridge, 149 U. S., 680, 690.

Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S., 184, 197.

Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S., 197, 219.

Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S., 479, 506.

Wight v. United States, 167 U. S., 512, 518.

Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S., 144, 172.

East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission, 181 U. S., 1, 18.

New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S., 361.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 439.

Interstate Commerce Commission v. Chicago Great Western Ry. Co., 209 U. S., 108, 119.

Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S., 452, 477.

Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R. Co., 220 U. S., 235, 253.

Union Pacific R. R. Co. v. The Updike Grain Co. et al., 222 U. S., 215, 220.

In *Union Pacific R. R. Co. v. Updike Grain Co. et al.*, *supra*, the Union Pacific had filed with the Commission a tariff in which it recited that "To expedite the movement, and to secure the prompt release and return of equipment," an elevator allowance for unloading from the cars and elevating grain at the Missouri River would be made to the elevators performing the service on through grain in carloads, transferred by the elevators at points named in the tariff, but it confined the allowances to cases where the cars were returned to the Union Pacific within forty-eight hours after they had been delivered by it for unloading, while it was a member of an association whose rules prohibited such return in many cases where the cars were not owned by the Union Pacific. As a consequence, parties whose elevators were located at the Missouri River, but on lines other than those of the Union Pacific, were discriminated against in favor of parties whose elevators were located on the Union Pacific's own tracks. The Union Pacific contended that this discrimination, whereby one party was paid for unloading the cars while like payment was denied to another party who performed similar service, was not unlawful because it resulted from differences in location of the different elevators. (Id., 216-218.) But in reply to that contention this court, speaking through Mr. Justice Lamar, said:

The carrier can not pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the

benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's tracks. This can not be directly done, nor indirectly by means of regulation. (Id., 220.)

We think the ruling of the court above set forth is clearly applicable to this case and fully justifies the order of the Commission here involved. Regardless of where the shipments originate, the services performed by the Federal Sugar Refining Company in delivering its shipments at the Jersey shore are the same as and in no respect different from the services performed by Arbuckle Brothers in delivering their shipments at the Jersey shore, and if, under these circumstances, the carriers pay an allowance to Arbuckle Brothers and refuse to pay a like allowance to the Federal Sugar Refining Company, the inevitable result is that the net amount received and retained by the carriers for the services performed by them in the transportation of the shipments of sugar is greater where the shipments are delivered to them at points on the Jersey shore by the Federal Sugar Refining Company than where the shipments are delivered to them at the same points by Arbuckle Brothers.

In its opinion the Commerce Court, after stating that in order to bring this case within the ruling of the Updike case, *supra*, it would be necessary to show that, within the lighterage limits, the Federal

Sugar Refining Company performs in connection with the transportation of sugar the same services performed there by Arbuckle Brothers (Rec., 118-119), said:

* * * It is apparent from the record that the sole disadvantage of the Federal Sugar Refining Company results from its location outside of the lighterage limits, * * *. (Rec., 119.)

But it will be seen, as we have previously pointed out, that the services performed are the same in each instance, notwithstanding that the plant of Arbuckle Brothers is located within while the plant of the Federal Sugar Refining Company is located without the lighterage limits. And it will also be observed that if the Federal Sugar Refining Company were to remove its plant from Yonkers to Pier 24, and thus bring it within the lighterage limits, it could not thereby avoid the discrimination here involved. In this connection his honor, Judge Mack, in his dissenting opinion, said:

The railroads are not concerned with the history of goods offered for transportation. (*Interstate Commerce Commission v. D. L. & W. R. Co.*, 220 U. S., 235.) If parties are ready to perform for compensation that part of the service which the railroad companies, by their offer to begin the carriage in New York instead of in New Jersey, have made transportation service, it can not be material to the railroads how the goods get to the point where this service is to begin—

whether it be by rail, barge, or wagon * * *. (Rec., 121.)

Do the facts, first, that the Federal Company's refinery is at Yonkers, that it brings its goods to Pier 24 primarily or solely to get them within the lighterage limits, that it has never demanded and does not want free lighterage from Pier 24, and that as a result thereof the transportation of its goods by the railroads begins in Jersey City; or, second, that Arbuckle Brothers are employed by the carriers to operate their wharf as a public terminal station, and to transport therefrom to Jersey City not only their own but others' goods, necessarily render the circumstances such that the Commission in the reasonable exercise of its powers could not find them to be substantially dissimilar?

(1) If this case were based on the grant of free lighterage to Arbuckle Brothers and the failure to grant it to the Federal Company, the latter would, of course, have no ground for complaint unless it really wanted and offered to avail itself of such free lighterage. But when, as here, the complaint is based on the grant to one and the denial to the other of the privilege, not of free lighterage, but of itself performing for compensation the transportation service from within the lighterage limits to Jersey City, it is no answer to assert that at present the situation of the two parties is not similar, transportation for the one beginning at New York and for the other at Jersey City. The charge is that this dissimilarity is due not to the voluntary act of the parties but to the

very discrimination sought to be removed as unjust, and that if the same privilege were granted the Federal Company as is granted Arbuckle Brothers—that is, to transport its goods from a point in the lighterage limits to Jersey City in its own or hired lighters, not at its cost, but as the compensated agent of the railroads, it would be ready, willing, and able so to do.

If this court must find that there is no substantial basis for the Commission's view that the Federal Company was shipping, and, on a grant of like privileges to those accorded Arbuckle Brothers, would be ready to ship from Pier 24 if the facts stated in the petition necessarily lead to the conclusion that the shipment is and would be direct from Yonkers, a point without, and not from Pier 24, a point within the lighterage limits, to Jersey City, there would [be] an end of this case. I am of the opinion, however, that this court should not so hold. (Rec., 120-121.)

(9) THE COURT ERRED IN STAMPING WITH THE SEAL OF GOOD FAITH THE CONTRACTS MADE WITH THE JAY STREET TERMINAL FOR THE PURPOSE OF GIVING ARBUCKLE BROTHERS AN ADVANTAGE OVER THE FEDERAL SUGAR REFINING COMPANY AND DENOUNCING AS A SUBTERFUGE THE CHANGE IN SHIPPING ARRANGEMENTS MADE BY THE LATTER COMPANY TO REMOVE THE DISCRIMINATION THUS BROUGHT ABOUT.

In its report, as above shown, the Commission stated that the allowances here involved are but the payment under tariff authority of what were formerly unlawful rebates paid secretly and without tariff authority to Arbuckle Brothers by the carriers,

but notwithstanding this statement of the Commission the Commerce Court, in its opinion, said:

* * * In the first place, the case must be freed from matters which cloud the real issue. It is continually suggested that the arrangement between petitioners and the Jay Street Terminal may be a scheme to cover a rebate. We are not permitted to base our judgment on suspicion, but upon facts pleaded and proven. Respondents have been given ample opportunity to produce all evidence within their power for the purpose of showing that the payments made by petitioners to the Jay Street Terminal constitute unlawful rebates, but no such evidence has been produced. On the contrary, respondents withdrew their answers and now ask the court to decide the case upon the facts stated in the petition. Surely upon this record the court ought to be relieved of presuming that the contracts made by petitioners with the Jay Street Terminal are a cover for the payment of unlawful rebates.

Again, the performance of the Ben Franklin Transportation Company at Pier 24, North River, is a play in which the episode is lost in the dénouement. It is a plain device and subterfuge indulged in on behalf of the Federal Sugar Refining Company for the purpose of making it seem that sugar which is being lightered from Yonkers, New York, ten miles north of the lighterage limits established by petitioners, was in fact shipped from Pier 24 by a delivery of the same at that point to the petitioners, when the uncontradicted record,

as admitted by the motions to dismiss, shows that the petitioners have nothing to do with the sugar of the Federal Sugar Refining Company until it reaches the New Jersey shore and is there delivered to petitioners. * * * (Rec., 117.)

We think this indicates that the court failed to give proper force and effect to pertinent and important facts stated by the Commission in its report, and also failed to give effect to the purpose which, primarily, prompted the enactment of the interstate commerce law, namely, the purpose to eliminate, and for the future prevent, unfair and unjustifiable discrimination, so far as they pertain to the transportation of interstate commerce by common carriers.

CONCLUSIONS.

We believe the history of this case shows clearly that the Commission has felt compelled recently to examine more closely than it formerly deemed necessary contracts entered into by and between carriers and large shippers, and restrain the operation of such contracts where, in the judgment of the Commission, the discrimination and preference and prejudice prohibited by sections 2 and 3 of the act could not otherwise be prevented. The Commission is of the opinion that it has been given such authority by the law under which it operates, and does not believe either that the amendments of June 29, 1906, contained in the Hepburn law, were made for the purpose of limiting its authority over discrimi-

nations, or that, when read in connection with other provisions of the act, they have that effect. On the contrary, it thinks those amendments were made to place in the hands of the Commission, in addition to the remedies which existed prior to that date, the remedy included in section 15, as aforesaid.

The reasonableness *per se* of the allowances paid by the carriers to Arbuckle and Jamison has not been passed upon by the Commission, nor does that question affect in any way the discrimination between Arbuckle and Jamison on the one hand and the Federal Sugar Refining Company on the other. That question might become important if an attempt were made to show that the rates exacted by the carriers for the transportation of sugar as compared with the rates exacted by them for the transportation of other traffic were unjustly discriminatory; but no such matter is involved in this case. Under the order of the Commission the carriers may discontinue the allowances paid on sugar, continue them as they are now, or change them to such other amounts as they may deem proper, but they may not discriminate in the payment of the allowances as between Arbuckle and Jamison on the one hand and the Federal Sugar Refining Company on the other.

In dealing with the matters under consideration the Commission has brushed aside artificial barriers, which are mere matters of form, and confined itself to the substance of the discrimination called to its

attention by the Federal Sugar Refining Company. Under the circumstances hereinbefore referred to in detail we think it was justified in doing so, and that the appellees' contentions concerning different names under which Arbuckle and Jamison operate, the matter of agency, liability under bills of lading, differences as between shipments f. o. b. Brooklyn and other shipments, differences as between points of origin of the shipments of sugar, etc., should be considered as of no importance. The Commission has shown that the discrimination in question was born of a desire to give Arbuckle and Jamison a preference over other shippers, which preference was effected by the payment of illegal rebates, and we think a similar disposition is indicated by the character of the matters advanced by the appellees at the present time in justification of the attempt to continue the discrimination in favor of Arbuckle and Jamison and against the Federal Sugar Refining Company.

The Commerce Court said it must assume that, since the order is in the alternative, the Commission did not find to be illegal *per se* the allowances paid to Arbuckle Brothers, but we respectfully submit that showing the allowances to be legal *per se* would not be equivalent to proving that they do not give to Arbuckle Brothers undue and unreasonable preference and advantage and subject the Federal Sugar Refining Company to undue and unreasonable prejudice and disadvantage.

The Commerce Court further said that—

In order to make the case parallel to the Updike case, it would have to appear that the Federal Sugar Refining Company also owned and operated for petitioners a public terminal for the receipt and delivery of freight within the lighterage limits, and that the Federal Sugar Refining Company had sugar of its own which it transported to the rails of petitioners together with other freight. (Rec., 118.)

In other words, the Commerce Court held that before the commission could legally conclude to be undue a discrimination between two shippers it would have to be shown that the circumstances and conditions pertaining to the shipments of one were exactly like the circumstances and conditions pertaining to the shipments of the other.

If this view of the law is correct it necessarily follows that where two parties are separately manufacturing and shipping sugar and have places of business located in the same vicinity and about the same distance from a general terminal of a carrier, the carrier may create between them a very harmful and injurious discrimination without violating any provision of the act to regulate commerce, by making the shipping place of one the carrier's terminal for the receipt of freight traffic and paying the shipper for hauling the traffic, including his own shipments, to such general terminal, while refusing to pay the other shipper for hauling his shipments to the same terminal.

It may be said, and the Commerce Court does in fact say (Rec., 119), that the second shipper might, in such a case, avoid in part the discrimination thus brought about by delivering his shipments to the carrier at a point nearer to his place of business than the general terminal referred to, which in this case would be the place of business of his competitor, but it is evident that he could not do so without giving information concerning his business to such competitor, and this, we submit, the carrier could not compel him to do.

In section 15 of the act a carrier is prohibited from giving information to one shipper concerning the shipments of another, and for violation of this provision a penalty of not exceeding \$1,000 for each offense is provided. If a carrier may not furnish information to one shipper concerning the shipments of another, we insist that it can not legally compel the former to either furnish such information or suffer the injury to him which will otherwise result from a discrimination voluntarily created by the carrier.

From these and other similar illustrations which might be made we think it clearly appears that the question actually decided by the Commerce Court was one of fact, concerning which the conclusion of the court was the opposite to that reported by the commission, and that in thus substituting its judgment for the judgment of the commission the court acted beyond its power in the premises.

Upon the record in this case, and for the reasons above set forth, we insist that the decree of the Commerce Court is erroneous and should be reversed.

Respectfully submitted.

P. J. FARRELL,
Solicitor for Interstate Commerce

Commission, Appellant.



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FILED.

DEC 24 1912

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, the INTER-
STATE COMMERCE COMMISSION
and the FEDERAL SUGAR REFINING
COMPANY,

Appellants.

vs.

THE BALTIMORE & OHIO RAILROAD
COMPANY, THE CENTRAL RAIL-
ROAD COMPANY OF NEW JERSEY,
et al.

Appellees.

In Equity, **385**

STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF THE FEDERAL SUGAR REFINING COMPANY.

ERNEST A. BIGELOW,

Solicitor for Federal Sugar Refining Company.

New York, December 21st, 1912.

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ADDENDUM.

The errors assigned by the appellants will be found at pages 125-128 of the Record.

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1912.

THE UNITED STATES, the Interstate
Commerce Commission and the
Federal Sugar Refining Company,
Appellants,

against

In Equity,
No. 862.

THE BALTIMORE & OHIO RAILROAD
COMPANY, The Central Railroad
Company of New Jersey, *et al.*,
Appellees.

**STATEMENT, BRIEF AND ARGUMENT ON
BEHALF OF THE FEDERAL SUGAR
REFINING COMPANY.**

This is an appeal from a decree of the United States
Commerce Court permanently suspending and enjoining
an order of the Interstate Commerce Commission.

The case first came before this Court on an appeal
from an order of the Commerce Court granting a pre-
liminary injunction. The appeal was dismissed because

it did not appear that the power to issue the order had been abused. This Court declined to go into the merits of the cause, stating as its reason that, inasmuch as the case for a preliminary injunction was, under the statute, the same as the case for a permanent injunction, for this Court to apply the ordinary equity rules and decide the case on the merits would be to expunge from the statutory powers of the Commerce Court the right to ponder the case before deciding as to the permanent injunction. Accordingly, the case was remanded so that there might be an opportunity to dispose of it on the merits in the forum selected by Congress for that purpose. (225 U. S. 306.)

Thereafter the appellants moved the Commerce Court to dismiss the bill, the motion was denied, appellants stood upon their motion, and the final decree was entered from which this appeal is taken.

The complainants in the bill are

(1) The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, New York, Ontario & Western Railway Company, and The Pennsylvania Railroad Company, trunk-lines having their rail terminals on the west shore of New York harbor;

(2) John Arbuckle and William A. Jamison, co-partners, operating a sugar refinery under the firm name of Arbuckle Brothers and a dock and lighterage business under the firm name of Jay Street Terminal, adjacent concerns located in Brooklyn, intervenors; and

(3) The Brooklyn Eastern District Terminal, a corporation operating a dock and lighterage business adjacent to the Havemeyers & Elder refinery now owned by the American Sugar Refining Company, and located in the Williamsburg district of New York City, intervenor.

The aforesaid parties are interested to defeat the order of the Commission.

The defendant named in the bill is the United States; the Interstate Commerce Commission appeared by its Solicitor; and the Federal Sugar Refining Company, a New York corporation, having its main offices in the Borough of Manhattan, New York City, and operating a sugar refinery at Yonkers, N. Y. intervened and was made a party defendant.

The order of the Interstate Commerce Commission was made on December 5, 1910, in a proceeding wherein the Federal Sugar Refining Company was complainant and the railroads above named were defendants, and is to be found at page 66 of the Record as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and having found that the allowances paid by the above named defendants to Arbuckle Brothers on their sugar brought by them on floats from (and) lighters to the regular terminals of defendants on

the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendants' said regular terminals on the Jersey shore, unduly discriminate against said complainants and unduly prefer said Arbuckle Brothers in violation of the act to regulate commerce:

It is ordered, that the above-named defendants be, and they are hereby, notified and required to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain, from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce."

The commission found that the appellee carriers offer free lighterage to and from their rail terminals on the New Jersey shore to all shippers located within certain arbitrary limits established by the carriers, the lighterage cost being absorbed in the New York rate, which is the same as the rate from the rail terminals; but that the exclusive privilege is granted to John Arbuckle and William A. Jamison, above named, to lighter their own sugar in their own equipment, and deliver it to the carriers at their rail terminals aforesaid, for which service the carriers pay to the said Arbuckle and Jamison an allowance of 3 or 4 $1/5$ cents per cwt. according to whether the sugar is consigned to points east of Buffalo

and Pittsburgh, or to points beyond; and that no such allowance, nor any allowance, is made to the Federal Sugar Refining Company although this company also lighters its sugar in its own equipment and delivers it to the carriers at their said rail terminals on the New Jersey shore for transportation under circumstances and conditions precisely similar to those attending the transportation of the sugar of its competitors, Arbuckle and Jamison.

The carriers seek to justify this discrimination on the ground that the private dock of Arbuckle and Jamison has been adopted by the carriers as their receiving station; but the Interstate Commerce Commission holds that no such artifice can conceal the true nature of the transaction and has ordered the carriers to stop paying the allowance to Arbuckle and Jamison unless they shall also pay it to the Federal Sugar Refining Company. This is the order complained of in the bill herein.

In further justification of their conduct, the carriers set up that the refinery of the Federal Sugar Refining Company is located outside the free lighterage limits. The lighterage distance from the Federal refinery to the various rail terminals of the appellee carriers is less, in some instances, than the lighterage distance from the extreme points within the lighterage limits to the said rail terminals, but the carriers refuse to rearrange the limits so as to include Yonkers, thereby compelling the Federal to lighter at its own expense the very considerable proportion of its shipments which the exigencies of the situation, including the inadequate service provided by the New York Central & H. R. R. Co., force it to ship over the lines of the appellee carriers.

Under these circumstances, in May, 1907, the Federal Sugar Refining Company of Yonkers, predecessor of the Federal Sugar Refining Company, appellant herein, filed a complaint with the Interstate Commerce Commission alleging unjust discrimination and undue preference, and praying that the appellee carriers be compelled either to provide free lighterage for its shipments from Yonkers or to pay to the Federal Company, on its shipments delivered to the carriers at their rail terminals, the same allowances paid to Arbuckle and Jamison on their sugar similarly delivered (I. C. C., Docket No. 1082). The case was submitted in June, 1908, and on June 24th, 1909, the complaint was dismissed without prejudice by the Commission, divided four to three. The majority, Chairman Knapp writing the opinion, held that the carriers were under no obligation to extend their lighterage limits to Yonkers. The dissenting Commissioners held that the transportation service rendered by the carriers begins at their rail terminals on the New Jersey shore and that it is unlawful for the carriers to pay to Arbuckle and Jamison and to refuse to pay to the Federal Company the allowances for their precisely similar services in bringing their shipments to the rail terminals. One member of the majority agreed with the principle expounded by the dissenting Commissioners but cast the deciding vote against the Federal Company on the ground that its refinery was not located within the lighterage limits.

Thereupon, the Federal Company altered its method and began shipping its sugar from Yonkers to Pier 24, a point within the lighterage limits, consigned to itself at its head office, located as aforesaid in New York City, and, upon notification of arrival and the completion of

the contract for local transportation, initiating a new transportation by directing the lighter to proceed to the said terminals and there deliver the sugar to the appellee carriers. In adopting this method of shipment the Federal Company was guided by the principles enunciated by this Court in the Texarkana case (204 U. S. 403) and its purpose was to meet the objection of the Commissioner above mentioned by showing that the point of beginning the interstate shipment and not the point of origin of the sugar was the essential fact.

Forthwith, in October, 1909, a new complaint was filed with the Commission (I. C. C. Docket No. 2888), which is the proceeding now before this Court. In the meantime, the Commission had granted a rehearing in the previous case (Docket No. 1082) and the two cases were heard together.

The contention of the Federal Company is that now, as formerly though under a different guise, Arbuckle and Jamison are performing accessorial services prior to the beginning of the transportation by the carriers, and that it is unlawful for the carriers to pay them an allowance therefor unless the same allowance is paid to the Federal Company and to all shippers tendering sugar in similar fashion at the rail terminals; and further, that if the lighterage from the Arbuckle dock be considered as a part of the transportation, as the term is used in Section 15 of the act to regulate commerce, then it is undue preference for the carriers to grant to one shipper and to refuse to others, the privilege of performing that portion of the transportation, and the allowance therefor. The contention of the appellees is that transportation does not begin at their rail terminals

but that the carriers have extended their lines to the Arbuckle dock by adopting and duly publishing this private dock as their terminal; that, having the right to establish a dock terminal and conduct lighterage transportation therefrom, they have the right, under Section 15, to pay a shipper a reasonable charge and allowance for performing this service in their behalf; and that, as the carriers cannot be compelled to "extend their lines" to any other private dock, no illegality can be predicated from their refusal.

After due hearing and investigation, these cases were submitted on April 13, 1910. In March, 1911, the Interstate Commerce Commission promulgated its report and order therein, dated the 5th day of December, 1910, whereby the then defendants, the appellee carriers herein, were ordered to cease and desist from paying allowances to Arbuckle Brothers on their sugar while at the same time paying no such allowances to the Federal Sugar Refining Company on its sugar, the payment of said allowances to Arbuckle Brothers being found to be discriminatory and in violation of the act to regulate commerce. The report and order of the Commission sustained the contentions of the then complainant as above outlined. Two members of the Commission, the then Chairman Knapp and Commissioner Prouty, dissented.

Thereafter, as above stated, the carriers petitioned the Commerce Court for a decree enjoining the enforcement of the order of the Commission.

FIRST POINT.

The present arrangement between the carriers and Arbuckle and Jamison is a fraud upon the spirit and the intent and the letter of the acts to regulate commerce. The arrangement had its origin in a flagrantly unlawful preference of these great shippers and was devised to perpetuate such preference.

The form is the form of an innocent contract between a carrier and a dock and lighterage concern; the substance is that of an unlawful and unjust preference of one group of shippers as against their competitor.

The Commission made very definite findings of fact in this connection. It says:

"In the past, as we know from various investigations and from an examination of old tariffs, Havemeyer & Elder, the predecessors of the American Sugar Refining Company, the dock of which is also involved in this proceeding, for many years enjoyed illegal preferences at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries, these allowances were extended to them, apparently under some sort of verbal arrangement. It was not until after the enactment of the so-called Elkins law that the lighterage allowances on sugar from the Arbuckle piers seem to have been published. They were then limited to sugar and coffee, being the commodities in which

Arbuckle Brothers were interested; and they were paid, as the tariff states, 'on account of the peculiar physical situation at the water front adjacent to the Arbuckle refinery,' a statement that has not been satisfactorily explained to the Commission although commented upon at the hearing. The allowances at both piers seem therefore to have had their origin in an unlawful preference of these great shippers. Apparently it was not until some years afterwards that the two piers were made public receiving stations of the defendant carriers. And it is sought to justify the allowances now paid to Arbuckle Brothers and the withholding of similar allowances to the complainant, on the ground that a substantial use is now made of the Arbuckle dock as a public terminal for handling the traffic of other shippers. It is contended that the allowances are unobjectionable at this time, either upon moral or legal grounds, because Arbuckle Brothers, as agents of the defendants, are now handling the merchandise of other shippers through their dock, and therefore may lawfully receive allowances on their own shipments as well as upon the shipments of others. It is our observation that such arrangements are rarely entered into with small shippers, but usually only with shippers that are financially strong and control a large traffic." (R., 48-49.)

After citing an instance of the sale of tonnage by the Havemeyers to one of these appellee carriers, the report proceeds:

"This matter, as well as the fact that the original allowances given to the Arbuckle Brothers were

limited to sugar and coffee, the commodities in which they deal, are here recalled for the purpose of emphasizing what seems to be clearly established by the records of the Commission, namely, that the allowances were originally extended to these shippers in order to put them on a preferred basis. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated, in the published tariffs of the defendants, as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them." (R., 49-50.)

"The peculiar, physical situation at the waterfront adjacent to the Arbuckle refinery" appears to have been peculiar only in this, that there was sugar tonnage at that point, that is to say, at the Arbuckle private dock, and that that sugar tonnage could be had by these carriers only on condition that they allowed Arbuckle to share with the Havemeyers the favors reserved for powerful shippers. (R., 50.) Long before this provision was inserted in the tariffs, these allowances were being paid to Arbuckle; (R., 48) but Federal grand juries were getting active (*United States vs. D., L. & W. R. R.*, 152 F., 269), and so this extraordinary discrimination, and its equally extraordinary justification were published to comply with the letter of the law.

Then came the adoption of the Arbuckle docks as the "terminals" of the railroads and the carriers proceeded to parcel out the Brooklyn shipping district between Arbuckle and Jamison and the Brooklyn Eastern District Terminal, giving exclusive rights to each in its own

territory, the railroads agreeing not to establish any other freight stations within the allotted territory "*unless legally compelled to do so*"? (R., 18.)

To bolster up the claim that here is a legitimate farming out of a portion of the transportation under Section 15 of the act to regulate commerce, the appellees declare that "the profits in the operation of the Jay Street terminal on all shipments during the same period amounted to less than 3% on the investment, without making any allowances for depreciation or interest." (R., 6.) The Commission sufficiently disposed of this by remarking that "net earnings, as every one knows, vary with the character and extent of the items embraced on the expense side of the account" (R., 50); and the subject is not further discussed here because counsel has consistently refused to develop that side of the evidence, resting his case on the contention that, as transportation by the carriers begins at the rail terminals on the New Jersey shore, any allowance to Arbuckle and Jamison, whether more or less than their lighterage cost, is a rebate and a discrimination against the Federal Company, or, in the alternative, that whatever is paid to them for conducting "transportation", if such it be, must be paid to the Federal Company.

Underlying the arrangement with these favored shippers is the fundamental purpose to handicap the independent company, the outsider, the Federal Sugar Refining Company, and prevent it from entering the markets on equal terms with Arbuckle and Jamison; in other words, to defeat the intention of Congress as manifested in the act to regulate commerce. The lighterage limits could be expanded at will, in all directions, north, east and south, but never to Yonkers, for there

was located the Federal's refinery. The docks of favored shippers could be adopted as "terminals" of the carriers, but never those of the Federal Company. The head offices of the Federal are situated not three blocks away from those of Arbuckle Brothers but the Federal is of that class of shippers for whom the lighterage limits were expressly established,—to keep them out, as this case shows. Nearly one-third of the west bound tonnage originating in New York City is sugar (R., 50); controlling such a substantial proportion of the total tonnage, the Havemeyers and Arbuckle Brothers issued their orders to the railroads, and those orders were submissively obeyed. (R., 50.) It remains to be seen whether the evil has been so obscured that it cannot be reached under existing law.

Taking advantage of a subordinate section of the act to regulate commerce, the appellees propose to defeat the fundamental purpose of the Act. Their method is simple: to declare the favored shipper's private dock to be a railroad terminal, grant him exclusive territory and trust to the necessities of the general public to force the growth of the terminal and conceal the underlying purpose. In final analysis the theory of the carriers is that they have the right "to extend their lines" to the private dock of any shipper merely by publishing his dock as a terminal and engaging him to conduct the lighterage; in other words, that their lines may be extended by fiat, duly published. If the scheme is permitted to succeed, a new and dangerous method of unjust discrimination will have been devised, compared to which the former methods were mere adolescents.

SECOND POINT.

The Commission's findings of fact, supported as they are by the evidence, will not be reviewed by this Court, and its conclusions of law were correctly drawn.

The order of the Commission is based on two propositions:

1. The transportation of Arbuckle and Federal sugar, *by the carriers*, begins at the rail terminals on the New Jersey shore, and the lighterage service is a purely accessory service, rendered prior to the beginning of such transportation; wherefore it is unjust discrimination for the carriers to pay to Arbuckle and Jamison, and refuse to the Federal Company an allowance on sugar thus delivered to the carriers and by them transported under substantially similar circumstances and conditions.
2. If, however, the transportation of Arbuckle sugar by the carriers begins at Jay St. Terminal and the lighterage be a "service connected with such transportation" for which the carriers may, under Section 15 of the Act, pay a reasonable allowance, then it is equally true that the Federal Company furnishes precisely the same facilities, at Pier 24, and performs the same service in the transportation of its sugar; wherefore, it is unjust discrimination and undue preference to pay an allowance to one and not to the other; or, stated in another way, to grant to Arbuckle and Jamison the privilege of, and allowance for, conducting a portion of the transportation of their sugar and at the same time to refuse a similar privilege and allowance to the Federal Company.

I.

As to the first proposition, the findings and conclusions of the Commission may be briefly summarized thus: Arbuckle and Jamison lighter their own sugar, from their own docks, in their own equipment, *and at their own expense and risk*, and deliver it to the carriers at their rail terminals on the New Jersey shore; on sugar so delivered the carriers pay to Arbuckle and Jamison an allowance of 3 or 4 $1/5$ cents per hundredweight, according to ultimate destination. (R., 45-46, 52.) The process is the same now as it was in the early days when it plainly constituted an unlawful rebating, except that the parties have entered into an agreement whereby the Arbuckle dock is made the receiving station of the carriers and it is so published in the tariffs. To the claim that Arbuckle and Jamison have thus been constituted the agents of the carriers, the Commission answers that, while it is true that bills of lading are issued in the names of the carriers by Arbuckle and Jamison as carriers' agents to Arbuckle and Jamison as shippers, nevertheless this is an empty form inasmuch as the contracts between the parties expressly provide that these shippers shall assume the entire responsibility for the merchandise received at their docks for shipment until the lighters carrying the same have been made fast to the float-bridges of the carriers on the New Jersey shore (R., 52); wherefore it results that if Arbuckle sugar is lost in the harbor, and if Arbuckle and Jamison as shippers receive from the carriers a sum in damages, Arbuckle and Jamison as agents must forthwith repay the same to the carriers under the indemnity clause of the contracts. There being nothing, then, to distin-

guish the shipments of Arbuckle and Jamison from those of the Federal Sugar Refining Company, which likewise lighters its sugar from its own docks, at its own expense and risk, and delivers it to the carriers at their said rail terminals (R., 53), the Commission concludes that it is unjust discrimination for the carriers to pay an allowance to Arbuckle and Jamison and refuse it to the Federal Company, the transportation service rendered by the carriers being like and contemporaneous, of a like kind of traffic and under substantially similar circumstances and conditions. (R., 51, 58-59.)

So far as the above conclusions embody findings of fact they appear not to be reviewable by the Courts; and it is to be noted that the finding that there is unjust discrimination is a conclusion of fact.

Interstate Com. Com'n vs. D., L. & W. R. R. Co., 220 U. S., 235.

So far as these conclusions involve matters of law they appear to rest on but a single legal proposition, to wit: that, inasmuch as the receipt of goods by the carrier, *co instanti* with the assumption of responsibility therefor, marks the beginning of "transportation," as the term is used in Section 2 of the act, the contractual relation of carrier and shipper being non-existent up to that moment of time, therefore the transportation of Arbuckle sugar by these carriers does not begin until the lighters are made fast to their float-bridges on the New Jersey shore, that being the point of time at which the carriers accept the goods and assume responsibility therefor.

This proposition would seem to be elemental.

Missouri Pac. R. vs. McFadden, 154 U. S.,
^{155.}
 L. & L. Fire Ins. Co. vs. R. W. & O. R., 144
 N. Y., 200.
 Coe vs. Errol, 116 U. S., 517, 528.

The single circumstance that Arbuckle and Jamison issue to themselves bills of lading in the name of the carriers does not suffice to overcome the legal conclusion arising from the fact that the sugar remains in their own possession and at their own expense and risk until the lighters have made fast at the rail terminals. (R. 52). A much stronger state of facts was presented in the McFadden case (*supra*) where the carrier itself issued the bill of lading, but was held not responsible for a loss because, in fact, delivery to it had not been made. Mr. Justice White's words in that case are peculiarly applicable here. He says:

"Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill. Of course, then, the carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods until then shall remain in the custody of the shipper."

If the Commission was right in thus concluding that the "transportation" of Arbuckle and Federal sugar begins at the rail terminals on the New Jersey shore, it is immaterial whether the shipments originated at Brooklyn or Yonkers or Pier 24 inasmuch as Section 2 of the act to regulate commerce does not allow the carriers to make a difference in rates because of differences in circumstances arising before the service of the carrier begins. (I. C. C. vs. D. L. & W. R. Co., 220 U. S. 235.) For this reason, the fact that Federal sugar is rebilled at Pier 24 is not discussed here but will be taken up later as a factor bearing on the second proposition involved in the Commission's order.

On the first proposition, therefore, it is submitted that the Commission has correctly disposed of the question of law, and that its finding that the arrangement between Arbuckle and Jamison and the carriers creates an unlawful discrimination, being a finding of fact which is supported by the evidence and as such not reviewable by the courts, should be accepted by this tribunal.

II.

As to the second proposition, the basic findings and conclusions of the Commission may best be stated verbatim, except for the appropriate changes in appellation:

"The sugar of the two competing shippers gets into the actual physical possession of the (appellee carriers) on the Jersey shore under practically similar conditions, and if, as the (appellee carriers) contend, the Arbuckle sugar commences to move at the Arbuckle dock, it must be remembered that the

(appellee carriers) also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If, then, the (appellee carriers) permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the (appellee carriers) under their tariffs, it is difficult to see upon what theory the (appellee carriers) may defend their refusal to recognize the lighters hired by the (Federal Sugar Refining Co.) as its facilities in performing for the (appellee carriers) a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers, for a service of transportation alleged to be performed by them for the (appellee carriers) with their own facilities, creates a present actual and substantial inequality that is unlawful under the act, when similar allowances are refused to the other and competing shipper for an exactly similar service. (R. 58-59.)

* * *

"This particular sugar happens to have been refined at Yonkers. But wherever it may have been made, the relevant fact from a transportation point of view is that at a given moment a quantity of sugar is at Pier 24 ready for shipment to interstate destinations on the lines of these (appellee carriers). It matters not how it got there, whether by lighter or by cart or by wheelbarrow; it is ready for

shipment at that point. At the same time a like quantity of sugar is ready at the Arbuckle dock for shipment over the same lines and to compete in the same markets. Under every principle of equality embodied in this legislation the (appellee carriers) must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way; and if under section 15, or under any other provision of the act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation service for the (appellee carriers), they must make a like allowance to the other shipper who has done precisely the same thing." (R. 58.)

"We had not regarded section 15 of the act as a warrant to a carrier for making an allowance to one shipper providing a facility and performing a service in the transportation of his own property, while refusing a similar allowance to another shipper providing a similar facility and performing the same service in the transportation of his property. Nor had we understood that a carrier, while giving to one shipper the privilege of providing a facility and performing a service in the transportation of his property, could refuse the same privilege to another shipper, and compensate the former while refusing any allowance to the latter. Nor is that the law. Certainly it can not be the law when the two shippers are competitors in the same line of business and in the same markets. If the (ap-

pelée carriers) accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege and make a like allowance to the (Federal Sugar Refining Co.) from Pier 24, the (Federal Co.) being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the (Federal Co.) from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we have found that the (Federal Co.) now lighters its sugar from Pier 24 which is within the lighterage limits." (R. 55-56.)

Briefly stated, then, the Commission finds that both shippers perform precisely the same service in lightering their respective shipments from points within the lighterage limits and delivering them to the appellee carriers at their rail terminals, and that, if the service performed by Arbuckle and Jamison be a part of the transportation, within the scope of Section 15, so also must be the service performed by the Federal Company. On this finding, which is of fact, the Commission bases the further finding of fact, that to pay to Arbuckle and Jamison an allowance for their services and to refuse to pay the Federal Company for its precisely similar services is to discriminate unlawfully.

In the latter finding is involved the conclusion of law that Section 15 affords no warrant to the carrier to

create a discrimination prohibited by other sections of the act to regulate commerce and this conclusion will now be considered.

The relevant portion of Section 15 of the act to regulate commerce is as follows:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Possibly, under this section the carriers have the right to grant to Arbuckle and Jamison the privilege of acting as their own receiving station and performing therefrom a portion of the transportation, and to pay them therefor; but the carriers go further and argue that, as the section is permissive merely, they have the right to refuse the same privilege and compensation to the Federal Company. This proposition, however, overlooks the fact that the right to confer the privilege under Section 15, and the duty not to exercise that right in such fashion as to create the undue preference prohibited by Section 3, are two quite different things. *In the case at bar the question is not as to the power, under*

Section 15, to grant the privilege to Arbuckle and Jamison; the question here is as to the right, under Section 3, to refuse a similar privilege to the Federal Company, and thereby, as was found by the Commission, give rise to preferences and engender discriminations prohibited by the act to regulate commerce.

The act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference, and it would be absurd to allow the incidental and wholly subordinate provisions of Section 15 to frustrate the fundamental purpose of the act. As was said by this Court in Interstate Com. Com'n vs. Ill. Cent. Ry. (215 U. S., at 477), in discussing another paragraph of this same section, to adopt the contention of the carriers would be to hold "that Congress, in enlarging the power of the Commission over rates, had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this Court has hitherto pointed out, it was the great and fundamental purpose of Congress to further."

The tariffs of these carriers duly publish the fact that free lighterage will be accorded to and from any dock, public or private, within the lighterage limits, and the appellees allege that they will send lighters to Pier 24 and transport therefrom the sugar of the Federal Company, the lighterage cost to be absorbed in the rate. It is not denied that no unjust discrimination can be predicated from an offer made to all, although some accept and others reject its advantages. The carriers go further, however, and grant to Arbuckle and Jamison and refuse to the Federal Company the privilege of conduct-

ing the lighterage themselves and receiving an allowance therefor. Here is a privilege which is neither published in the tariffs nor granted to all shippers and it is this, as appellants contend, which constitutes the undue preference and discrimination, and it is this which the Commission, a "tribunal appointed by law and informed by experience" has found as a fact to give rise to preferences and engender discriminations prohibited by the act to regulate commerce.

In the Grain Elevator cases recently before this Court (Interstate Com. Com'n vs. Diffenbaugh, 222 U. S. 42) "the same services in elevation were offered to all shippers, and the same allowance was made to all operators of elevators, whether they were or were not the owners of the grain transported." (See opinion of Circuit Court, 176 F. at page 411.) Would this court have approved of the allowances had it appeared that, although free elevation was granted to all shippers, the right to perform this service and receive a cash allowance therefor was exclusively granted to but one shipper?

The answer is to be found in the recent decision of this Court in Union Pac. Ry. vs. Updike Grain Co., (222 U. S. 215), wherein was examined the practice of the carrier in offering to pay all shippers for elevator services and then by special rules so restricting the offer that only the Peavey Company could avail of it. Declaring that the power to make such a discrimination would prevent the enforcement of any regulation frequently having such operation, this Court laid down the broad rule that "the carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar ser-

vice." This appears to dispose of the contention of the appellees that they may pay Arbuckle and Jamison for lighterage service performed as part of the transportation under Section 15, and refuse payment to the Federal Company for its services, precisely similar, as the Commission has found.

One other conclusion of law is embodied in the Commission's second proposition, viz.: that the Federal Company initiates the interstate transportation of its sugar, *so far as these carriers are concerned*, at Pier 24, a point within the lighterage limits. This proposition depends upon whether the intention of the Federal Company as to the ultimate destination of its sugar has any bearing on its two separate contracts with the Ben Franklin Company, one to transport the sugar to Pier 24 and notify the consignee; the other to transport from Pier 24 to the rail terminals.

It would seem that merely to state the proposition is to answer it, within the authority of

Gulf C. & S. F. Ry. vs. Texas, 204 U. S., 403.

The Commission found as facts that Federal shipments from Yonkers are consigned to the head office in New York City and that the local transportation is complete when the lighters are made fast at Pier 24 and notice is given to the consignee; that "the lighterman has no authority to go further or any instructions for a further movement and must wait there for authority and instructions"; and that the second movement is not initiated until, upon notice of arrival, the Federal Company issues instructions to the lighterman either to discharge at the dock or to proceed to the receiving stations

of various carriers, rail or water, and among others the appellee carriers, bills of lading showing the consignor to be the Federal Company, 138 Front St., New York City, being then handed to the lighterman for execution by the receiving carriers. (R., 45-48, 8.)

Here, then, are two independent shipments, one local, the other the beginning of an interstate movement, and it is the latter which alone concerns the appellee carriers. The fact that the shipper may have intended a further movement when the sugar was loaded at Yonkers is utterly immaterial so far as its contract for local transportation is concerned and it was so held in the case cited, where the court said:

"Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn, was a matter immaterial so far as the completed transportation was concerned,"

instancing as analogous the case of a passenger who buys a ticket for one place intending all the while to proceed therefrom to a further destination.

If it be argued that Federal sugar is not discharged from the lighters at Pier 24 and that there is, therefore, no physical delivery, the answer is that the same was true as to the corn in the Texarkana case, which was "transferred under original seals and without breaking packages, to the Texas & Pacific Ry. Co., after having remained in Texarkana five days; the only thing done by F. L. Atkins was to surrender the Kansas City Southern bill of lading, have the cars set over on the T. & P. Ry., and take a bill of lading from the latter company." (14th Finding, p. 407.)

On the second proposition, therefore, it appears that the Commission has found that the Federal Company lighters its sugar to the appellee carriers from Pier 24 (R., 56), basing this conclusion on a sound principle of law, and that this company and Arbuckle and Jamison perform "an exactly similar service" so far as the carriers and Section 15 are concerned. (R., 59.) It further appears that the Commission reached a sound conclusion of law in ruling that the power conferred on the carriers by Section 15 carries no warrant to use that power in such fashion as to discriminate between shippers, in violation of other sections of the Act. (R., 55, 58-59.) Wherefore, it is submitted that the finding of the Commission (R., 57) that to grant to Arbuckle Brothers and refuse to the Federal Company the privilege of conducting a portion of the transportation, and the allowance therefor, is to unjustly discriminate against the Federal Company and to unduly prefer Arbuckle and Jamison, should, as a finding of fact, be accepted by this Court.

THIRD POINT.

The Federal Sugar Refining Company has no apologies to offer for adopting the expedient of re-billing at Pier 24, an expedient which has received the sanction of this Court.

The plan was adopted in order to meet the views of the Commissioner who had cast the deciding vote against the company in the case as first submitted. (I. C.

C. No. 1082.) This Commissioner agreed with the minority that the transportation of Arbuckle sugar by the carriers began at the rail terminals on the Jersey shore and that unjust discrimination would necessarily exist if the carriers permitted one sugar shipper within the lighterage limits to lighter his sugar and receive pay for that service and refused the same privilege and compensation to another sugar shipper also located within the lighterage limits; but he concurred with the majority on the sole ground that the Federal refinery was not located within the lighterage limits. (R., 32.) At that time the fact had not been brought clearly to the attention of the Commission that the head and only general offices of the Federal Sugar Refining Company were located within the lighterage limits. (R., 46.) Having in mind the rule applied in the case of *Gulf, C. & S. F. vs. Texas* (204 U. S., 403) counsel advised the Federal Company to have the shipments from the Yonkers refinery consigned to itself at its head offices and then, and not till then, to initiate the interstate transportation in which alone these carriers are interested. This course was adopted, with the result that Commissioners Clark and Cockrell concurred in the majority report issued in the second case presented to the Commission (I. C. C. No. 2888) and now before this Court.

As to the propriety of its motives, the Federal Company conceives that it is entitled to accommodate its conduct to settled principles of law, even though it be impelled thereto by an enlightened self-interest.

It appears that, in the case cited, the shippers "*kept themselves informed* of interstate commission freight rates and of the State commission rates, *and the reason why* they contracted for the corn to be delivered to them

at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City and had it shipped from Kansas City to Goldthwaite." (204 U. S. at 406.) Nevertheless this Court did not feel called upon to moralize on the pernicious ingenuity of these shippers nor did it stigmatize their traffic economies as artifices and shams. The officers of the Federal Sugar Refining Company likewise "kept themselves informed" as to traffic conditions, and their purpose in adopting the new method of shipment was precisely the same as that animating the Texan shippers, viz.: to obtain the benefit of favorable rates imposed on the carriers by a duly constituted authority.

The Court below severely criticizes this expedient of the Federal Company, terming it a plain device and subterfuge indulged in "for the purpose of making it seem that sugar * * * was in fact shipped from Pier 24 by a delivery of the same at that point to the petitioners." (R. 117.) The learned Court appears to have inadequately comprehended the purpose of the Federal Company as set forth in the briefs and argument of its counsel. The basic proposition is, and always has been, that the Federal Company and the Arbuckles deliver their sugar to the carriers at their rail terminals on the Jersey shore, and counsel is chagrined at the ill success attending his efforts to make this clear to the learned Commerce Court.

FOURTH POINT.

The so-called admission by counsel for the Federal Sugar Refining Company did not admit, at least in the sense ascribed to it by the dissenting Commissioners; and, in any event, is quite immaterial.

In his dissenting opinion, Presiding Judge Knapp of the Commerce Court, the then Chairman of the Commission, says: "Indeed, in one aspect the facts now presented seem to me less favorable to complainant, since it appears in this proceeding, by the explicit avowal of its counsel during the oral argument, that the transfer of the Jay Street terminal to the defendant carriers and its operation by them would result in no benefit to complainant. This being so, as must be assumed from the admission made, I do not see how the ownership and operation of that terminal by Arbuckle Brothers constitutes undue preference to them or undue prejudice to complainant." (R., 60.)

Commissioner Prouty, also dissenting, says: "Counsel for the complainant deliberately stated upon the argument that his client would be in no respect benefited if the operation of that terminal were to pass into the hands of a third party or were to be taken over by the defendants themselves. If, then, the complainant is not damaged by the arrangement as it exists, why should we interfere with that arrangement which appears to be for the common benefit of the public and of the rail-ways?" (R., 64.)

With the utmost deference to these learned Commissioners it is submitted that their proposition amounts

simply to this: If the accessorial allowance on shipments received by the carriers at their rail terminals be discontinued and, instead thereof, the rails of the carriers (figuratively speaking) be extended to Jay Street thereby making that dock a veritable terminal of the railroads; in other words, if the carriers cure the discriminatory accessorial allowance by extending their lines to the point at which the accessorial service begins, the Federal Company will not be benefited; wherefore it cannot be damaged by the arrangement as it exists.

It seems that here is a *non sequitur*. As well might it be said that there was no discrimination in the Wight case (167 U. S., 512) because the complaining shipper would not have been benefited if the railroad had extended its rails to the warehouse of the favored shipper. In both cases there was discrimination and the way to cure it *to the benefit of the complaining shipper* was to stop it, not to perpetuate it in another form, however nearly that form might assume a semblance of legality.

Such was the scope of the so-called admission, but, even if made with the full force and effect attributed to it by the dissenting Commissioners, it is quite immaterial, this Court having ruled that the Commission has the power in the public interests to consider the whole subject, disengaged by any supposed admissions, even if contained in the statement of complaint.

C. H. & D. Ry. vs. Interstate Com. Com'n, 206 U. S., 142, 149.

FIFTH POINT.**As to the opinion rendered by the majority of the Court below.**

1. The first point made by the Court below is that "it is continuously suggested that the arrangement between petitioners and the Jay Street Terminal may be a scheme to cover a rebate" and that inasmuch as appellants had not responded to an "ample opportunity to produce all evidence within their power for the purpose of showing that the payments made by petitioners to the Jay Street Terminal constitute unlawful rebates" the Court ought to be relieved from making any such presumption. (R. 117.)

In reply, it is deferentially urged that, while the evil history of the arrangement between the carriers and the Arbuckles may or may not properly raise a presumption that an unlawful rebate lurks therein, the record necessitates not a presumption but an inevitable conclusion that the payment to Arbuckle and Jamison is an unlawful rebate, PROVIDED the "transportation" of Arbuckle sugar by the carriers, under Section 2 of the Act, does not begin until the sugar is delivered at the rail terminals on the Jersey shore.

The Court below decides this proviso adversely to the contention of appellants, and there is, therefore, no room for either the presumption or the conclusion, but it is respectfully submitted that the point suggested for the Commerce Court's consideration did not, as stated by the Court, cloud the issue, nor rest upon suspicion or facts not in evidence.

The opposing contention of appellants, that transportation of Arbuckle sugar by the carriers cannot be said

to have begun until the same is delivered to the carriers on the Jersey shore is set forth in the Second Point, *supra*.

2. The Court then cites numerous authorities on the proposition that, providing the charge is reasonable, the law permits the carriers to farm out the terminal and transportation service. (R. 118.)

This proposition is not disputed except as, under the facts in this case, it impinges on the Commodities Clause of the Act. Appellant's contention is not that the carriers may not, under Section 15, pay a shipper for services, but that they may not work an undue preference thereby, in violation of Section 3. This, also, is discussed under the Second Point, *supra*.

3. Proceeding, the Court discusses the facts and reaches the conclusion, as a matter of law, that the services rendered by the Arbuckles and by the Federal Company are dissimilar, because the Arbuckles own and operate a public terminal, whereas the Federal Company does not. The Court says:

"The payments made by petitioners to the Jay Street Terminal are for the terminal and transportation services performed by it in connection with all freight shipped from or delivered to said Jay Street Terminal. It so happens that Arbuckle Brothers, who own and operate the terminal, also are shippers, and only in this way can it be said that they receive payment for transporting their own sugar. In order to make the case parallel to the Updike case, it would have to appear that the Federal Sugar Refining Company also owned and

operated for petitioners a public terminal for the receipt and delivery of freight within the lighterage limits, and that the Federal Sugar Refining Company had sugar of its own which it transported to the rails of the petitioners together with other freight. If the case stood in such position, under the Updike case it might be necessary to hold that the petitioners must make the same payments to the Federal Sugar Refining Company as to Jay Street Terminal. But the always-present fact is that the Federal Sugar Refining Company does not own and operate any public terminal for petitioners, nor does it transport a pound of sugar from any terminal within the lighterage limits to the rail termini of petitioners." (R., 118.)

In reply it is respectfully urged that the question is not: "What else do the Arbuckles do?" but "What do the Arbuckles do *in regard to their sugar* which is not done by the Federal Sugar Refining Company?"

The fact that the Arbuckles operate also a terminal for the receipt of general freight does not alter or obscure the fact that they lighter their own sugar from their own docks, in their own equipment and at their own expense and risk, and deliver it to the carriers at the rail terminals, precisely as does the Federal Company. The differences as to general freight do not create dissimilarities in the circumstances and conditions under which Arbuckle and Federal sugar is lightered to the rail terminals. An unlawful discrimination is not cured by its juxtaposition with lawful acts of a different nature.

The essential service rendered by both shippers is to get the sugar from a point within the lighterage limits to the rail terminals, and whether this involves an expensive investment in Brooklyn or a hired dock in Manhattan, and whether in addition to this service the Arbuckles also lighter freight for the general public, are immaterial.

As said by Mr. Justice McKenna in the Railroad Fuel case (225 U. S., 326, at 343): "But such features do not affect the carriage, qualify or alter the essential service, which is to get an article from one place to another. * * * There is, it is true, a difference in the manner of delivery, depending upon the difference in the facilities possessed by the railroads and other consignees." (See also the remarks of Buffington, C. J., in Penn. R. Co. vs. Int. Coal Mining Co., 173 F. 1, at pages 3-5.)

4. Concluding its opinion, the Court below says:

"But it is claimed that this is true: That it costs the Federal Sugar Refining Company three cents per hundred pounds more to get its sugar to the Jersey shore than it does Arbuckle Brothers,"

and the Court attributes this handicap to the fact that the Federal Company

"voluntarily located its refinery at Yonkers, and if it thereby has subjected itself to some natural disadvantage it cannot call upon the courts to remedy it. * * * It is apparent from the record that the sole disadvantage of the Federal Sugar Refining Company results from its location outside the lighterage limits," etc. (R. 119.)

In reply it may be pointed out that the reason it "costs the Federal Sugar Refining Company three cents per hundred pounds more to get its sugar to the Jersey shore than it does Arbuckle Brothers" is not because of any disadvantage of location but because this cost is refunded to Arbuckle Brothers and not to the Federal Company, by the carriers.

It was to remedy the disadvantage resulting from this preferential payment, and not because of any natural disadvantage in location, that the Federal Company applied to the Interstate Commerce Commission.

FINAL POINT.

**The decree of the Commerce Court
should be reversed and the case remanded
with directions to dismiss the bill.**

ERNEST A. BIGELOW,
Solicitor for Federal Sugar Refining
Company, one of the Appellants.

Dated New York, December 21st, 1912.

6
Office Supreme Court, U. S.
FILED.

JAN 15 1913

JAMES H. MCKENNEY,
PLAINTIFF

In Equity, No. ~~885~~ 885

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

UNITED STATES, INTERSTATE COMMERCE COMMISSION
AND FEDERAL SUGAR REFINING CO.,

Appellants,

vs.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.,

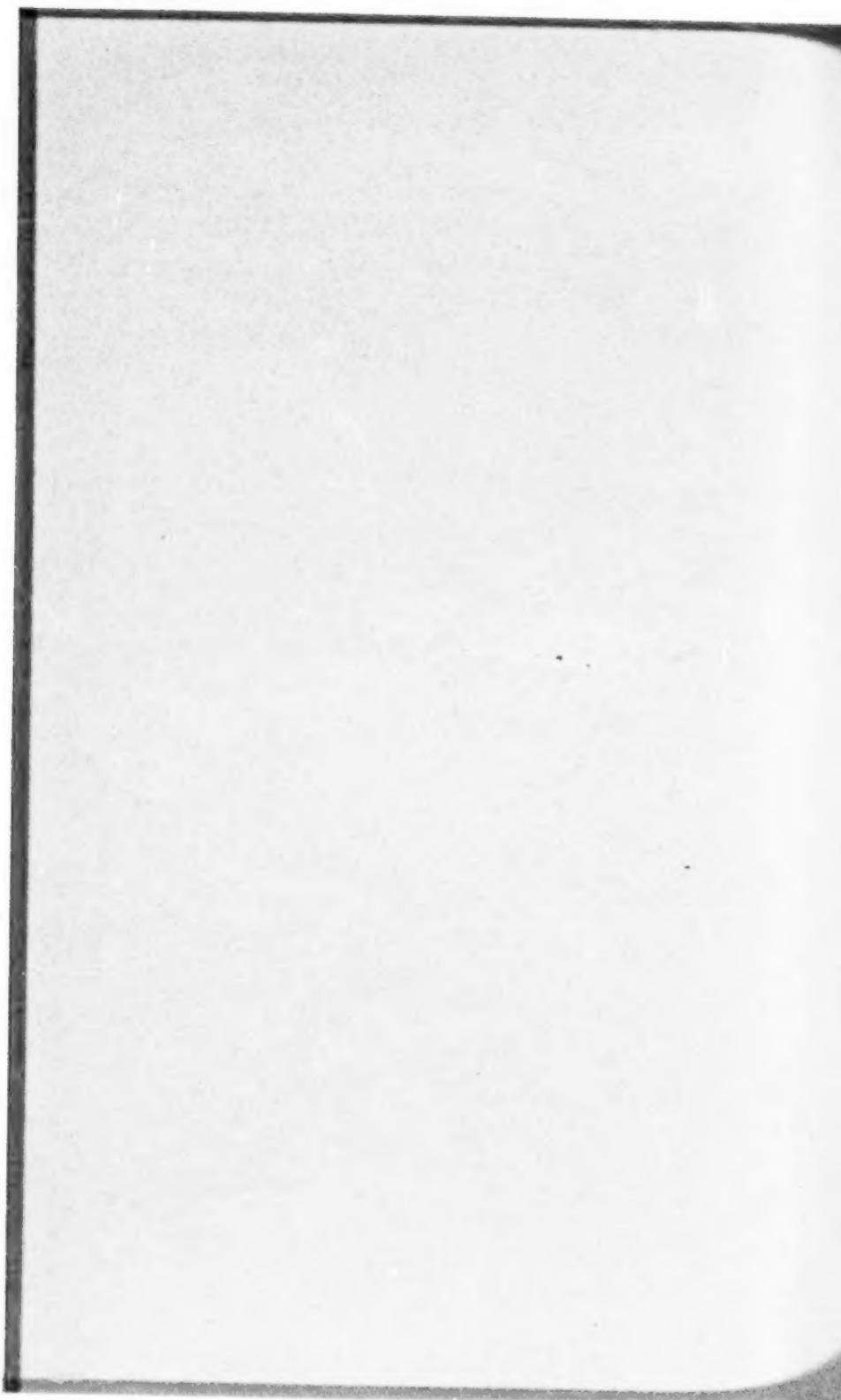
Appellees.

BRIEF FOR RAILROAD COMPANIES, *Appellees.*

GEO. F. BROWNELL,

H. A. TAYLOR,

Solicitors for the Appellees.



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To be argued by
MR. GEORGE F. BROWNELL
for the Railroad Companies.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

**THE UNITED STATES, THE INTER-
STATE COMMERCE COMMISSION,
and the FEDERAL SUGAR RE-
FINING COMPANY,**

Appellants,

vs.

In Equity, No. 862.

**THE BALTIMORE & OHIO RAILROAD
COMPANY *et al.*,**

Appellees.

**BRIEF FOR RAILROAD COMPANIES,
APPELLEES.**

Statement.

This is an appeal from a final decree of the Commerce Court enjoining enforcement of an order of the Interstate Commerce Commission, made December 5th, 1910, of which the appellees herein were notified on or after March 6th, 1911, in the case of the Federal Sugar Refining Company against the railroad companies, appellees, I. C. C. Docket No. 2888.

The order in question notified and required the several railroad companies, appellees, to cease and desist on

and after April 15, 1911, and for a period of not less than two years thereafter abstain, from paying certain "allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowances" to the Federal Sugar Refining Company on its sugar. Subsequently the effective date of its order was extended by the Commission to June 1, 1911.

The several railroad companies filed their petition in the Commerce Court against the United States to set aside and annul the order of the Commission. The Federal Sugar Refining Company, the complainant before the Commission, was granted leave to intervene. The Brooklyn Eastern District Terminal, a corporation, and the Jay Street Terminal and Arbuckle Bros. copartnerships, in which John Arbuckle and William Jamison are the co-partners, conducting separate businesses in the two copartnerships, were also granted leave to intervene, all of these intervenors being parties interested in securing the annulment of the Commission's order.

A motion was made upon notice for a temporary injunction restraining the enforcement of the said order. This motion was made upon the petition filed in the case, and the affidavits attached to the notice of motion together with the testimony and proceedings had before the Commission. The evidence before the Commission was, however, on motion of counsel for the Government and for the Commission, excluded on the hearing of the motions for a temporary injunction and to dismiss the petitions by order of the Commerce Court. The United States, the Commission and the Federal Sugar Refining Company filed motions to dismiss the petition which were extended by order of the Commerce Court to cover the intervening petitions of Jay Street Terminal, Arbuckle

Brothers and the Brooklyn Eastern District Terminal (Record, p. 100). The motion for a temporary injunction was heard by the Commerce Court upon the petition of the railroad companies, the affidavits attached to their notice of motion and the intervening petitions of the Brooklyn Eastern District Terminal and of Jay Street Terminal and Arbuckle Brothers.

The motions to dismiss were denied after a full hearing and the motion for a preliminary injunction suspending the order of the Interstate Commerce Commission until the final determination of the action was granted by the Commerce Court. The United States and the Federal Sugar Refining Company filed answers to the petition and intervening petitions after their motions to dismiss were denied, but the Interstate Commerce Commission elected to stand on its motion to dismiss. An appeal from the order or decree of the Commerce Court was taken to this Court. The first error assigned in the assignment of errors by the Commission and the Federal Sugar Refining Company was that "the Court erred in not dismissing the petition for want of equity," and it was contended by the Commission before this Court as its first point that the Commerce Court erred in not dismissing the petition for want of equity (Brief, 1st Appeal, pp. 26 *et seq.*). The decree of the Commerce Court was affirmed and the case remanded for the further consideration of the Commerce Court (United States *et al.* vs. The B. & O. R. R. Co. *et al.*, 225 U. S., 306).

Subsequently, the United States and the Federal Sugar Refining Company upon leave granted by the Commerce Court withdrew their answers previously filed, and substituted therefor their motion to dismiss. This action of the United States and the Federal Sugar Refining Com-

pany left the case standing upon the petitions of the petitioners and the intervening petitioners and the motions to dismiss of the United States, the Interstate Commerce Commission and the Federal Sugar Refining Company. It was stipulated below that the case be submitted for final decision upon the merits on the petitions and motions to dismiss. After hearing, a final decree was entered setting aside and annulling the order of the Commission. From the final decree this appeal has been taken by the United States, the Interstate Commerce Commission and the Federal Sugar Refining Company. The record on this appeal is substantially identical with that on which the former appeal was heard, as the affidavits used on the motion for a preliminary injunction had no material bearing on the motions to dismiss or for final decision.

The case comes before this Court with all the facts set forth in the petition and intervening petitions admitted (Angle vs. Chicago, St. Paul, etc., Ry., 151 U. S., p. 1 at p. 10).

Statement of Facts and Proceedings Before Commission.

The following statement of facts is quoted from the former opinion of this Court (U. S. vs. B. & O. R. R. Co. *et al.* pp. 306, 315-320 incl.):

"The Federal Sugar Refining Company has a refinery at Yonkers, N. Y., and Arbuckle Brothers have a refinery in the Borough of Brooklyn, New York City. The railroad companies operate what are known as trunk line railroads extending from New York to western and southern points. In order to receive and deliver freight in New York City they are obliged to transport the same across the waters of New York harbor on lighters by what

is called lighterage service ; or, when the freight is carried through in railroad cars, on car floats by what is called floatage service.

" At numerous points along the New York City water front within the lighterage limits they have established public stations for the receipt and delivery of freight.

" They have also established boundaries known as 'lighterage limits,' including substantially all of what may be called the manufacturing and commercial portion of the water front of New York City and the opposite shore of New Jersey and within these boundaries they receive and deliver freight at any accessible point on the water front without any additional charge above the New York rates, which are, generally speaking, the same as the rates to and from the terminals on the New Jersey shore. At 'public' docks open to any vessel, the railroad pays the wharfage ; at private docks the shipper or consignee must arrange for the necessary dockage.

" At a number of points in the Boroughs of Brooklyn and the Bronx, the railroad companies or some of them furnish public stations through arrangements made with terminal companies to furnish union public stations and terminal facilities for the receipt and delivery of freight in cars and through freight houses, and for the transportation of such freight between such terminal stations and the railroad companies' rails on the western shore of the harbor, all of which is done for and in the name of the railroad companies under provisions of their tariffs filed with the Interstate Commerce Commission under which their New York rates apply to and from such union public stations.

" One of these public terminal stations, known as the Jay Street Terminal, is owned and operated by William A. Jamison and John Arbuckle, conduct-

ing a separate business in that respect as copartners under the name and style of 'Jay Street Terminal' in accordance with the laws of the State of New York. Jay Street Terminal is named as a station of the railroad companies, appellees, in their respective tariffs, and is conducted under contract with the railroad companies like any other freight station, bills of lading being issued from and to it on behalf of the railroad companies and in their names, on the regular uniform form, charges being collected and accounts kept, the Jay Street Terminal performing the entire physical and clerical service and furnishing the necessary docks, freight yard and station buildings and equipment, excepting cars. The Jay Street Terminal also floats or lighters all shipments between the terminal and the rails of the railroad companies on the New Jersey shore. For these services and facilities each railroad company pays to the Jay Street Terminal an aggregate compensation figured on the freight handled for it, based on the rate of $4\frac{1}{2}$ cents per hundred pounds on freight originating at or destined to points at or west of the westerly limits of Trunk Line Territory, so called, and 3 cents per hundred pounds on freight originating at or destined to points east of the westerly limit of Trunk Line Territory. The same amounts per hundred pounds are paid to other terminal companies furnishing similar service at New York.

" The refinery of Arbuckle Brothers, a copartnership composed of William A. Jamison and John Arbuckle, is within two blocks of the Jay Street Terminal, and they truck sugar from their refinery to this terminal and load it into cars at their own expense and deliver it to the Jay Street Terminal and obtain the railroad company's bill of lading for it from the Jay Street Terminal just as other shippers do with other freight.

" The refinery of the Federal Sugar Refining

Company at Yonkers, N. Y., formerly operated by the Federal Sugar Refining Company of Yonkers, is located on the Hudson River, ten miles north of the limits of the lighterage limits. The sugar manufactured at this refinery and shipped over the lines of these appellees is loaded onto lighters of the Ben Franklin Transportation Company, an independent boat line with which the Federal Sugar Refining Company has made a contract, under which the boat line lighters its sugar to the terminals of the railroad companies for three cents per hundred pounds. The boat line brings the sugar to the terminals of the railroads on the western shore of New York harbor and delivers it to them for rail transportation.

"The Federal Sugar Refining Company's refinery at Yonkers is located directly on the tracks of the New York Central and Hudson River Railroad Company. Over this railroad the rates to the points in the shipping territory of the Federal Sugar Refining Company are with few exceptions the same as the rates via the lines of the railroad companies. To ship at the New York rate over the lines of the roads the Federal Sugar Refining Company can deliver its shipments to the New York Central and Hudson River Railroad at Yonkers, thence to be transported by that railroad to New York and there delivered to the said railroad companies within lighterage limits. None of these railroads have lines extending to Yonkers. Because of alleged delay in the handling and transportation of shipments via this route, the Federal Sugar Refining Company sometimes prefers to deliver said shipments by lighter to the said railroad companies at their stations on the New Jersey shore of New York harbor.

"Prior to July, 1909, these shipments were carried by the Ben Franklin Transportation Company directly to the rail terminals on the Jersey shore

from Yonkers without stop. Since that date the lighters stop en route at Pier 24, North River. The reason for stopping at Pier 24 is found in the decision made by the Commission in case No. 1082, brought by the Federal Sugar Refining Company of Yonkers, the predecessor of the Federal Sugar Refining Company, against the same railroad companies, appellees here (17 I. C. C., 40). The complaint in that proceeding claimed a discrimination against the Federal Sugar Refining Company of Yonkers and in favor of the Jay Street Terminal and the Brooklyn Eastern District Terminal, an incorporated company operating a similar terminal station in another section of Brooklyn, because of the refusal of the railroad companies to pay it the same amounts on account of the lighterage performed by the Ben Franklin Transportation Company from Yonkers to the rail terminals of the railroad company on the western shore of New York harbor as were paid to the two terminal companies above named on account of the various services performed and terminal facilities furnished by them in connection with the transportation of sugar shipped by Arbuckle Brothers and the American Sugar Refining Company respectively. This complaint was dismissed because the extension of the lighterage limits in New York harbor of the railroad companies was a matter of business discretion, and that the Commission had no authority to require such extension beyond the then-prescribed boundaries, and that the Federal Sugar Refining Company, being located outside of the prescribed lighterage limits, was not subjected to unlawful discrimination by reason of the practice of the railroad companies in affording free lighterage on shipments originating at a distance to points within said lighterage limits while refusing to so afford on shipments of the Federal Sugar Refining Company.

"As a result of this decision of the Commission the lighters of the Ben Franklin Transportation Company were stopped en route from Yonkers at Pier 24, North River, where certain formalities with reference to shipping orders were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers, but from Pier 24, North River, a point within lighterage limits. A new complaint was filed with the Commission, setting forth the same grounds of discrimination as the prior one; but, on the theory that the decision of the Commission did not apply because the shipments of the Federal Sugar Refining Company were now lightered from Pier 24, a point within lighterage limits and not from Yonkers, the Commission held as a matter of law that the stoppage of the lighters of the Ben Franklin Transportation Company for instructions at Pier 24, differentiated the case from the former one and made the following order:

"It is ordered that the above-named defendants (the appellees) be and they are hereby notified and required to cease and desist on or before the 15th day of April, 1911, and for a period of not less than two years thereafter abstain from paying such allowances to Arbuckle Brothers on their sugar, while at the same time paying no such allowance to said complainant (Federal Sugar Refining Company) on its sugar, which said allowances so paid to said Arbuckle Brothers by said defendants are found by the Commission in said report to be unduly discriminatory and in violation of the act to regulate commerce."

"The so-called 'allowances' referred to in this order are a part of the payments making up the compensation of the Jay Street Terminal, figured

at the rates of three cents and 4 1-5 cents per hundred pounds as above described."

This is the order which has been set aside by the Commerce Court.

In a number of respects the facts as alleged in the petition and so found by this Court to be accurately stated, are not in accord with what the appellants in their briefs claim the facts to be and to have been found by the Commission. It is submitted that in case of variance the facts are to be taken as alleged in the petition and as found by this Court, and not as asserted by counsel for appellants.

The first complaint of the Federal Sugar Refining Company of Yonkers to the Interstate Commerce Commission alleged violations of Sections 1, 2, 3 and 15 of the Act to Regulate Commerce (Record, p. 19).

The allegation as to Section 15 was doubtless intended to refer to the provision that a charge and allowance to the owner of property transported, for any service connected with or instrumentality used in such transportation shall be no more than just and reasonable, and to raise the question whether the payments by the Railroads to Jay Street Terminal and Brooklyn Eastern District Terminal were in violation of this provision.

This issue was eliminated by the Commission's first opinion and report to the effect that the payment to Jay Street Terminal was not more than just and reasonable and did not exceed the authorized measure of compensation (Record, pp. 25 and 31). Any question as to payments to the Brooklyn Eastern District Terminal was "virtually waived on the hearing" on the first complaint (Record, p. 39 and p. 60), that Company appearing not to have any substantial relationship with any shipper.

The second complaint, in which the order now at issue was made, does not attempt to revive the question as to the reasonableness in amount of the payment to the Jay Street Terminal, and alleges no violation of Section 15 of the Act to Regulate Commerce nor does the Commission find any. The second complaint alleges charging unjust and unreasonable rates in violation of Section 1; unjust discrimination in violation of Sec. 2, and "undue and unreasonable prejudice" in violation of Sec. 3 of the Act to Regulate Commerce.

The Commission does not state its conclusions, (as required by Section 14 of the Act to Regulate Commerce), and has not framed its order, with such definiteness as clearly to inform us what section of the Act, *in its opinion*, the Railroad Companies have violated.

It is clear, however, both from the report of the Commission and its order that it does not find any violation of the requirement of Section 1 that rates shall be *just and reasonable*. The report excludes that question as not before the Commission (Record, p. 59). The order is also not responsive to any such conclusion as it fixes no new rate available to all shippers.

It is clear then that the violation found to exist, in the opinion of the Commission, is of either Section 2 or Section 3 or both.

Section 2 defines and prohibits *unjust discrimination*, Section 3 prohibits *undue or unreasonable preference or advantage, prejudice or disadvantage*.

In its report the Commission repeatedly refers to *undue discrimination*, generally in connection with references to preference or advantage, prejudice or disadvantage or what it calls "inequalities" (Record, pp. 44, 51 and 55). We find no specific conclusion that there was *unjust dis-*

crimination in violation of Section 2 either in the report or in the order. In the order it is recited that the Commission has found that the Railroad Companies "*unduly discriminate*" and "*unduly prefer*" and that "*said allowances so paid to Arbuckle Brothers*" are "*unduly discriminatory*" and in violation of the Act to Regulate Commerce.

This loose use of the statutory terms, commingling and reversing the application of the qualifying words, makes it impossible to determine definitely whether the Commission has concluded that the Railroad Companies are guilty of violating Section 2 or Section 3 or both.

Under the well-established rule Section 2 applies to cases of discrimination between shippers from the same point over the same line, for the same distance and under the same circumstances of carriage (I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., 144). To show an unjust discrimination forbidden by Section 2 in this case Arbuckle Brothers must be shown to be shippers from the stations of the Railroad Companies on the Jersey shore because the Federal Sugar Refining Company, so far as shipping over the lines of the Railroad Companies is concerned, obviously makes its shipments from the stations on the Jersey shore. The Railroad Companies do not have anything to do with the shipments of the Federal Sugar Company before receipt at such New Jersey stations.

There is apparently no definite "conclusion" or "finding" in the Commission's report to the effect that Arbuckle Brothers are shippers from stations on the Jersey Shore as distinguished from the Jay Street Terminal in Brooklyn. The Commission states, upon this subject (Record, p. 52):

"The complainant contends that in lightering their sugar to the Jersey Shore and there delivering it to the defendants, Arbuckle Brothers perform

what the complainant refers to as a purely accessory service. *We incline to think* this is a sound view of the matter. * * * It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers. Much, therefore, *may be said* in support of the *theory* that at that point and at that moment is the relation of shipper and carrier between the defendants and Arbuckle Brothers actually established, and that only at that moment of time do the mutual liabilities and responsibilities attending that relation spring into being."

And, again (Record, p. 54) :

" We have therefore been *inclined*, as heretofore stated, to regard the lightering of their own sugar across the river as an accessory service by Arbuckle Brothers from their private dock, and not as a service of transportation from a public receiving station of the defendants. * * * It is not necessary, however, to draw fine distinction between an accessory service and a service of transportation, as applied to the facts in this case. If the allowances made by the defendants subject the complainant to an undue discrimination or give Arbuckle Brothers, their competitors, an unjust preference, a wrong is being done that must be remedied by an appropriate order, whether the allowances are paid for as for an accessory service or for a service of transportation."

See, also, the further qualified and conditional, statements of the Commission on the same subject (Record, pp. 54, 59).

It might be assumed, therefore, that the Commission's

order is not based on any conclusion that Section 2 is violated. Nevertheless, it is argued by the counsel for the appellants, in support of the Commission's order, that the Commission did conclude that the sugar shipped by Arbuckle Brothers was delivered to the Railroad Companies for transportation only on the Jersey shore; that the payments to Jay Street Terminal were for purely accessorial services, and constituted a violation of Section 2; and that the order of the Commission was, in part at least, based thereon (Brief of Federal Sugar Refining Company, pp. 7, 14, 15, 16, 17, 18).

Therefore, we attempt to show, as we did in our former argument in this Court, that any conclusion of the Commission to the effect that Arbuckle Brothers were shippers from the stations of the Railroad Companies on the Jersey shore would be erroneous in law and that there was no violation of Section 2; also that the order of the Commission was not appropriate, and not within the powers granted to it, for the purpose of remedying any such alleged violation of Section 2.

Assuming that the Commission concluded that there was a violation under Section 3, similar questions arise as to whether under the facts there was in law any undue or unreasonable preference or advantage, prejudice or disadvantage such as to empower the Commission to make an order, or whether there were different circumstances and conditions which in law removed any disadvantage to which the Federal Sugar Refining Company may have been subject, from the operation of Section 3, also whether the order of the Commission is in form and substance such as it is authorized to make to prevent violation of Section 3.

A R G U M E N T.**POINT I.**

The Commission committed an error of law in considering the Federal Sugar Refining Company as a shipper from within lighterage limits.

The Federal Sugar Refining Company has not the status of a shipper from New York within lighterage limits; there is a single continuous shipment of sugar by boat from Yonkers to the Jersey shore and no new shipment originating at Pier 24, North River.

This point is treated first because the order of the Commission is based on the theory that the shipments of the Federal Sugar Refining Company are from a point within lighterage limits, namely, Pier 24, North River, otherwise its shipments would have to be regarded as from Yonkers, a place beyond lighterage limits, in which case the Commission concededly could not make an order requiring an allowance to be paid to the Federal Sugar Refining Company whether as a condition of payments to the Jay Street Terminal or otherwise, as more fully discussed below.

The point of distinction between the case presented by the second complaint of the Federal Sugar Refining Company and the first petition is explained by Commissioner Harlan in the Commissioner's report as follows:

"Under the arrangement in effect at the time its first petition was before us, the sugar was lightered by the Ben Franklin Transportation Company

directly from the complainant's dock at Yonkers to the defendants' freight depots on the Jersey shore. But since our report in that proceeding was announced the method of handling the traffic has been changed and the arrangement upon which this complaint is based was agreed upon and carried into effect by the two companies" (Record, p. 46).

A statement is then made in the Commission's report of the details of this arrangement and the conclusion is reached that the shipments of sugar lightered from Yonkers to the rails on the western shore of the Hudson River with the stop enroute at Pier 24 North River, are as a matter of law, new shipments from Pier 24 to the terminals of these appellees. The conclusion is stated in the following language :

"On the record in the former proceeding, as heretofore explained, it appeared that the lighterage movement commenced at Yonkers which is outside the lighterage limits. On the record now before us the complainant contends that the lighterage movement to the receiving stations west of the river commences at Pier 24, where the complainant gives its shipping instructions to the lighterage company. Without entering here upon any discussion of the importance of the fact in the disposition of this proceeding, it will suffice to say that we accept the complainant's contention that the sugar is now being lightered to the defendants at Jersey City from Pier 24, which is inside the lighterage limits" (Record, pp. 47-48).

The facts concerning the transportation of the sugar of the Federal Sugar Refining Company from its refinery at Yonkers to the stations of these railroads on the western shore of New York Harbor, with a stop of the lighter en-

route at Pier 24, North River, are undisputed, and were in fact stipulated by the parties.

After the decision of the Commission on the first complaint, holding that it was not an unlawful discrimination for the Railroad Companies to refuse to pay for the lighterage of sugar from Yonkers, while paying the Jay Street Terminal for floating the sugar of Arbuckle Brothers from Brooklyn to rail terminals on the western shore of the Hudson River, the Federal Sugar Refining Company adopted the following practice for the purpose of making it appear that its shipments originate at Pier 24, North River, which is a point within lighterage limits.

The Federal Sugar Refining Company has its principal office at 138 Front street, New York City. When sales contracts for sugar are received by it, they are given serial contract numbers, and an order bearing a serial contract number is sent to the refinery at Yonkers to be filled. The barrels or bags of sugar are stamped with the contract number of the order they fill. The shipment bearing the contract number remains intact until it reaches the purchaser of the sugar (Record, pp. 7-8).

Shipping instructions are also sent by the office at 138 Front street to the refinery, showing the contract number, the ultimate destination of the sugar, and the rail line over which the shipment is to be transported. The shipment is placed on board the lighter of the Ben Franklin Transportation Company and the captain of the lighter gives a receipt which shows that he has received so much sugar in good order. It is not a bill of lading and does not specify what the terms of shipment are, the rate or the point of delivery, or the person to whom delivery is to be made. It is a bare receipt acknowledging the receipt of so much sugar in good order and nothing more. The

captain of the lighter receives from the refinery a railroad bill of lading form filled in by the Federal Sugar Refining Company, designating a consignment to the Federal Sugar Refining Company, 138 Front street, New York City, to be transported by the Ben Franklin Transportation Company and showing the contract number with which the shipment has been marked. This document is not signed by the representative of the Ben Franklin Transportation Company, nor does it call for transportation to or delivery at Pier 24, North River, a part of which is leased to the Ben Franklin Transportation Company (Record, p. 8).

After the lighter has been stopped at Pier 24, North River, the captain calls up the office of the Federal Sugar Refining Company at 138 Front street and reports the particular shipment then on his lighter. The captain of the lighter is then given a form of railroad bill of lading showing the name and address of the consignor as the Federal Sugar Refining Company, 138 Front street, New York, Franklin street, Pier 24, North River. The lighter then proceeds across the river to the New Jersey rail terminus of such of the railroad companies as had been previously designated in the shipping instructions sent to Yonkers and there delivers the shipment to such railroad company and obtains the signature of the agent of the railroad company at the terminus upon the form of bill of lading, which bill is stamped by the agent to show the receipt of the shipment at the railroad company's terminal station on the west shore of New York Harbor (Record, p. 8).

These shipments are handled by the Ben Franklin Transportation Company under a contract with the Federal Sugar Refining Company, providing for the payment of 4 cents per hundred pounds for lighter sugar from Yon-

ers to Pier 24, North River, and only 3 cents from Yonkers to the terminals of these railroad companies on the west shore of the Hudson. The Ben Franklin Transportation Company still receives only 3 cents per hundred pounds for lightering the sugar the entire distance from Yonkers to the New Jersey railroad stations via Pier 24, being the same compensation received by it when it formerly lightered the sugar directly from Yonkers to those terminals without this intermediate stop (Record, p. 9). The 4-cent lighterage charge on shipments to be delivered at Pier 24 presumably covers the delivery on the pier which the Ben Franklin Company provides for such local shipments and is not made on shipments delivered to the railroads.

The practice above outlined of having the lighters of the Ben Franklin Transportation Company stop en route from Yonkers to the terminals of these appellees, at Pier 24, North River, was admittedly and avowedly a device and subterfuge established by the Federal Sugar Refining Company for the purpose of making the lighterage from Yonkers to these appellees' terminals appear to be, as a matter of law, two distinct transportation services, one from Yonkers to Pier 24, and the other from Pier 24 to the terminals on the west shore of the Hudson, and thus to make the shipment one originating at Pier 24 within the ruling in the case of *Gulf, Colorado and Santa Fe Railway Company against Texas*, 204 U. S., 403.

That case involved the question of whether a shipment transported from Texarkana to Goldthwaite in the same State was an interstate shipment as between those points because it had been shipped in the first instance from a point outside the State to Texarkana and reshipped (after five days but without unloading), to Goldthwaite. This

Court held on the facts in that case that the shipment from Texarkana to Goldthwaite was a separate transaction, not interstate, but subject to the laws of the State.

The first thing to be noted in connection with the case referred to is that this Court treated the question of whether the case involved a single transportation transaction or two separate transactions as a question of law. This is obvious from the fact that this Court stated that the facts as found by the Court below were conclusive upon it, but nevertheless proceeded to consider at length the question referred to and to pass upon it.

It was held that whether or not there were two separate transactions of transportation depended on the terms of the contract; as this Court said: "The transportation * * * follows the contract of shipment, until that is changed by the agreement of owner and carrier" (p. 412). To determine the nature of the contract an examination of the facts was made and it was found, that there was a contract for the transportation from Hudson, South Dakota, to Texarkana; that neither shipper nor consignee changed or offered to change the contract of shipment or place of delivery; that the consignee accepted the shipment at Texarkana, the place of delivery; that the first contract was thus completed, and that the first carrier afterward by direction of the owner turned the shipment over to another carrier to be carried forward to Goldthwaite under a new contract covering only transportation between those points and evidenced by a new bill of lading to that effect (p. 412). The shipment lay five days at Texarkana before it was reshipped (p. 413).

The transaction under consideration here was diametrically opposite to that in the Texarkana case in each of the decisive particulars mentioned.

There was no contract between the Ben Franklin Transportation Company and the Federal Sugar Refining Company for the transportation of the sugar in question from Yonkers to Pier 24.

The written evidences of the nature of the actual contract are the receipt given by the Ben Franklin Transportation Company and the agreement fixing the rate of its compensation, the latter being considered in connection with the amount of compensation actually paid under it.

The receipt in every case was a bare receipt (Record, p. 9). It did not contain any conditions to relieve the Ben Franklin Transportation Company from any measure of liability on tender at any particular place, and so far as the receipt itself was concerned it put the Ben Franklin Transportation Company in the position of a continuous carrier to whatever ultimate destination it might finally carry the goods until the actual delivery thereof out of its hands, irrespective of how many changes in shipping directions the Federal Sugar Company might give. To that extent the bare receipt is evidence against the existence of separate contracts for transportation to and from Pier 24.

The agreement for the compensation of the Ben Franklin Transportation Company provided for a stated amount to be paid for lighterage and delivery of sugar at Pier 24, namely, four cents per cwt., and for a different compensation for sugar lightered to and delivered at railroad stations on the Jersey shore, namely, three cents per cwt. (Record, p. 9). This written contract was not changed in 1909 when the new practice was adopted and the Federal Sugar Company continued as theretofore to pay three cents per cwt. for lighterage from Yonkers to these appellees' terminals, in spite of the stop en route at Pier 24,

and did not pay the existing contract price for delivery at Pier 24. No separate price was ever agreed upon for the alleged separate service from Pier 24 to the terminals of the Railroad Companies.

This agreement as to compensation and the course of dealing thereunder thus show that the transportation from Pier 24 across the river was, even in 1909 and after, separate only as it might affect relations with the Railroad Companies and for its effect upon the Interstate Commerce Commission. The Sugar Company and the Ben Franklin Company did not treat it as a separate transaction between themselves.

The existence or scope of a contract depends on the actual relations between the parties, not on forms adopted for their effect on others.

The document delivered to the Ben Franklin Transportation Company at Yonkers by the Federal Sugar Refining Company (Record, p. 8) is incompetent as evidence of the nature of the contract between the Ben Franklin Transportation Company and the Federal Sugar Refining Company, because this document, which purports to be a bill of lading, was not issued or signed by the Ben Franklin Transportation Company, and the delivery of this document was not understood by the officers of either the Ben Franklin Transportation Company or of the Federal Sugar Refining Company to establish a separate contract for lighterage from Yonkers to Pier 24 or to amount to shipping instructions from the Federal Sugar Refining Company to the Ben Franklin Transportation Company.

It is very clear that the use of this document was adopted as a lawyer's plan for giving the appearance of a separate contract for transportation from Yonkers to Pier 24, but

that there was no such understanding by the parties to the contract of the purpose and intent of the plan as was necessary to constitute a meeting of the minds and the making of a contract of that sort.

The form of the document delivered to the Ben Franklin Transportation Company at Yonkers shows that it was a mere formality, which was not understood by the parties to affect the transportation contract. The form used was the uniform railroad bill, although the transportation to be performed was by boat line. It contained numerous provisions purporting to govern the liability of the carrier, applicable to railroad transportation and not to transportation by boat, and which were not understood to be accepted by the parties to the actual transportation contract. It was not signed by the Ben Franklin Transportation Company or any other carrier and contained the contract number identifying the shipment, which, taken in connection with the shipping instructions given to the refinery from the office at 138 Front Street, which contained the initials of one of the Railroad Companies in each case, shows that the shipment was actually made by the refinery from Yonkers to the Jersey shore station of one of these petitioners (Record, p. 8).

It is clear that the directions received by the captain of a lighter after its arrival at Pier 24 constituted nothing more than a completion of shipping directions, or, at the most, such instructions to the captain of the lighter can be considered only as a change in the contract of shipment or place of delivery, in view of the compensation paid to the Ben Franklin Transportation Company for its entire service and the absence of any separate contract or arrangement for compensation for the lighterage from Pier 24 to the railroad terminal. In this respect the transaction

differs from that of the Texarkana case, as one of the facts on which this Court based its decision was the absence of any change in the contract of shipment or place of delivery.

The whole transaction is analogous to the practice on rail lines of billing shipments to a conventional destination at which they are never intended to be delivered, and stopping the same in transit for diversion or reconsignment orders. In such case it would hardly be questioned that, as a matter of law, the proper rate to apply, assuming the privilege of stoppage for orders to be properly covered by tariff, is the through rate from point of original shipment to destination, with such proper tariff charge as may be made for the stoppage privilege. The Commission has recognized the unity of the transportation transaction in such cases and in other cases of transit privileges by ruling that the rate applicable must be the rate in effect at the time of original shipment.

"10. (A) * * * Such tariffs must stipulate clearly the extent of such privileges and the charges connected therewith, and shall also state whether or not the rate published by the initial carrier from the point of origin to ultimate destination will apply. If the through rate does apply, it must be as of the date of shipment from point of origin" (Tariff Circular 18-A ; Rule governing tariff showing reconsignment privileges).

"119. *Reshipping of Grain.*—Upon inquiry whether a proposed tariff rule providing that the rate to be applied on all outbound transit grain of record shall be the specific rate that is lawfully in effect from Chicago at the time the grain is reshipped, may lawfully be incorporated in a tariff. Held, that the Commission cannot sanction the rule,

and that the grain can move only as a through movement on the through rate in effect at the time it starts, or as a local movement" (Conference Rulings Bulletin No. 5).

In the Texarkana case the Court stated as important factors that the consignee accepted the shipment at Texarkana, the place of delivery, and that the first contract of shipment was thus completed. There is no evidence of such acceptance of shipments by the Federal Sugar Refining Company at Pier 24. The shipments did not leave the custody of the Ben Franklin Transportation Company. There was no receipt given for the property by the Federal Sugar Refining Company on arrival at Pier 24.

This Court also considered as important in the Texarkana case the fact that the shipment was turned over at Texarkana to another carrier and a new contract for transportation actually made with that carrier. Counsel for the Federal Sugar Company bases his argument that there is a new shipment initiated by that Company from Pier 24 upon the erroneous premise that two separate contracts are made by that Company with the Ben Franklin Transportation Company, "one to transport the sugar to Pier 24 and notify the consignee, the other to transport from Pier 24 to the rail terminals" (Federal Sugar Co.'s Brief, p. 25). There was no such new contract made between the Ben Franklin Transportation Company and the Federal Sugar Refining Company for transportation from Pier 24 to the terminals of the railroads. The receipt given by the Ben Franklin Transportation Company at Yonkers was the only one shown to have been given, and as stated there was no contract for the separate compensation of the Ben Franklin Transportation Company for the service from Pier 24 to destination, the compensation paid being for transportation from Yonkers to destination.

In the Texarkana case it was also pointed out as an important fact that the shipment remained at Texarkana five days before it was shipped out. In this case the lighter with sugar on board remained at Pier 24 only for such time as was necessary to receive further directions in the form of railroad bills of lading from the office of the Federal Sugar Refining Company, 138 Front street.

We urge that the facts as above set forth show conclusively as a matter of law that the contract of transportation between the Ben Franklin Transportation Company and the Federal Sugar Refining Company was a contract for transportation from Yonkers to the terminal of one of these appellees and that, therefore, these shipments are to be regarded as coming from Yonkers, and as a matter of law are not entitled to be treated as shipments originating within lighterage limits on the doctrine of the first decision of the Commission in this case.

The effect of the change in practice was no more than if the Federal Sugar Refining Company had sent its clerk on the lighter of the Ben Franklin Transportation Company to give the lighterman instructions as to the place of delivery after reaching the lighterage limits.

As Commissioner Prouty says in his dissenting opinion (Record, p. 65):

"The transaction, in fact is precisely the same now that it was formerly, except that the steamer now stops at Pier 24. Great stress is laid in the opinion upon the fact that the *Ben Franklin* is actually made fast to the wharf, but to my own mind it would subserve exactly the same purpose if she were to whistle in midstream when passing that pier. It is impossible for me to understand how any performance of this character can change the actual relation of these parties when the thing accomplished is in both cases identical."

If these shipments of sugar had actually been delivered to the Federal Sugar Refining Company at Pier 24, North River, the 4-cent rate per hundred pounds would have applied and the shipments would then have been entitled to free lighterage from Pier 24 by these appellees under their lighterage regulations to their terminals.

The shipments of the Federal Sugar Refining Company which are delivered at stations of the railroad companies on the Jersey shore are not handled at Pier 24. They are not taken from the boat which stops there merely for completion of shipping directions. The transportation from Yonkers cannot be separated from the transportation from Pier 24 to the railroad stations across the river. The transportation from Yonkers to the stations on the Jersey shore is clearly an entirety. Possibly the Federal Sugar Refining Company might change its mind and divert shipments starting from Yonkers for delivery at the stations of the railroads on the Jersey shore to local New York consumption or other destinations, but it does not do so. When such shipments start from Yonkers they are clearly destined for delivery to a particular station on the Jersey shore, as shown above. Furthermore it is only when they are so delivered that they have any connection with this case.

It is difficult to comprehend how it can be urged that the decision of this Court in the Texarkana case furnishes any basis for the contention that the mere stopping of the lighter of the Ben Franklin Transportation Company at Pier 24, on its journey from Yonkers to the terminal of one of these appellees on the Jersey shore constitutes the making of a new shipment from that pier as distinguished from Yonkers. The mere fact that the Federal Sugar Refining Company hands to the lighterman at Yonkers a rail-

road bill of lading blank form showing itself as consignee at 138 Front Street, New York City, cannot turn into two separate shipments a single shipment made under one single contract evidenced by the receipt which the lighter-man gives the Federal Sugar Refining Company at Yonkers, and by the rate of 3 cents per cwt. which applies to shipments by the Ben Franklin Transportation Company from Yonkers to the terminals of these appellees. This Court held in the case of Railroad Com. of Ohio vs. Worthington, 225, U. S., page 101, that the State Commission had no power to fix the rate for the transportation of lake cargo coal billed by shippers from the mines in the State of Ohio to themselves at the lake ports within that State, because the lake cargo rate included the actual placing of the coal into vessels to be carried beyond the State destination. It was pointed out in the opinion at page 109 that in the Texarkana case "a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed." How then can it be said that there was a new shipment from Pier 24, when there was no new contract of shipment from that pier, and when the rate paid the lighterage company included the transportation from Yonkers and delivery to these appellees on the Jersey shore.

The undisputed facts clearly distinguish the situation here from that presented to this Court in the Texarkana case and the transaction is analogous to that considered in the case of Southern Pacific Terminal Company vs. Interstate Commerce Commission (219 U. S., 498, at pp. 526 and 527). See also Texas & Pacific Ry. Co. vs. Railroad Commission of Louisiana (183 Federal R., 1005).

The question is clearly one of law, under the admitted facts. The similar question involved in the case of Texas

& Pacific Ry. Co. vs. Railroad Commission of Louisiana above cited was treated as a question of law. It came to the Circuit Court on exceptions to a Master's conclusions of law. In the case of Gulf, Colorado and Santa Fe Ry. Co. vs. Texas, above cited, this Court stated that it was bound by the findings of the State Court as to the facts, and then proceeded to consider and determine whether, as a matter of law, and on the facts as found by the State Court, the case presented a single continuous shipment or two separate and distinct shipments.

The Commerce Court said upon this point:

"The statement of facts makes it plain that the Federal Sugar Refining Company transports its sugar direct from Yonkers to the Jersey shore. * * * The facts do not bring the case within the ruling of the Supreme Court in Gulf, Colorado and Santa Fe Railway Company vs. Texas (204 U. S., 403)"

The order of the Commission being based on its conclusion in this respect, and such conclusion being erroneous in law, the Commission's order is invalid, irrespective of whether the Commission might or might not lawfully have made the same order on other grounds (Southern Pacific Co. against Interstate Commerce Commission, 219 U. S., 433).

POINT 2.

The order of the Commission was beyond its power, because, in effect, it requires these appellees to extend their lines to Yonkers by requiring them to pay more than the cost of bringing the Federal Sugar Refining Company's shipments from Yonkers.

Upon the first complaint of the Federal Sugar Refining Company, the Commission held that these appellees could not be compelled to lighter the sugar of that company from Yonkers or pay for such lighterage, whether on account of the arrangement with the Jay Street Terminal or otherwise (17 I. C. C., p. 40). This decision was predicated upon the proposition that the extension of these Railroad Companies' lines from the west shore of the Hudson to New York and Brooklyn by means of the lighterage service was a matter of business discretion, concerning which the Federal Government had not assumed to exercise authority, if any exists, and that therefore it could not be a discrimination forbidden by law for the carriers to extend their lines by means of this lighterage service to New York, without extending them still farther, to a distinct municipality like Yonkers.

The correctness of its former decision is recognized by the Commission in its report in the present case. Commissioner Harlan, who wrote the majority opinion, said :

“ The complainant, the Federal Sugar Refining Company, is also a refiner of sugar and competes with Arbuckle Bros. in supplying that commodity to consumers in the interstate communities, reached

by the defendants and their connections. Its refinery is located at Yonkers. Adjacent to and connected with it, the complainant owns a pier or dock. *Yonkers, however, is outside the lighterage limits* established by the defendants in New York Bay and the two rivers, which together form what we have referred to as the harbor of New York; and the complainant therefore does not enjoy from its dock the benefit of the free lighterage service offered by the defendants, under their tariffs to shippers to and from piers that are within the limits."

The arrangement for stopping the lighter enroute from Yonkers to Jersey City at Pier 24 and withholding final directions for delivery from the lightermen until said stop was the only new factor before the Commission in the second case, and if the Commission's conclusion that this stoppage enroute effectuated a new shipment from Pier 24, is in error, then the case is absolutely the same as that presented to the Commission on the first complaint of the Federal Sugar Refining Company and should be governed by its decision in 17 I. C. C., 40. Otherwise these appellees will be required to pay even more than the cost of the lighterage from Yonkers to their terminals, which means an extension of their lighterage service to the municipality of Yonkers. Such a requirement is beyond the statutory power of the Commission to impose upon these carriers.

The petitioners are under no statutory or other legal obligation to extend their lines by rail or water.

It was said by Judge Jackson in his opinion in the case of Kentucky and Indiana Bridge Company vs. Louisville & Nashville Railroad Company, 37 Fed. Rep., at page 621.

"The act to regulate commerce deals with such com-

mon carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable, and ample stations and depots for the accommodation of their business, the law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards or depots, even though such additional constructions might be for the convenience of the public, or of other carriers. Congress has certainly not undertaken even if they possessed the power to deal with such matters."

It is undisputed that the practical effect of compliance with the Commission's order by payment of an allowance to the Federal Sugar Refining Company would be the extension of lighterage limits to Yonkers, so far as the Federal Sugar Refining Company's shipments are concerned, because it is undisputed that the smaller unit of compensation to the Jay Street Terminal on the tonnage basis, viz., 3 cents per cwt., would cover the total charge of the Ben Franklin Transportation Company from Yonkers to Jersey City. It is submitted that the Commission cannot, on the basis of an evident device adopted by the Federal Sugar Refining Company, make an order to accomplish a result which it would clearly be without power to order directly.

Counsel for the Government recognized in his former argument in this Court that the order, in effect, requires these appellees to extend their lines to Yonkers by requiring them to pay more than the cost of bringing the Federal Company's sugar from Yonkers, and sought to justify it

by asserting that the Commission did not base its conclusions and order on the understanding that by the device adopted by the Federal Company the shipment from Yonkers terminated at Pier 24, and a new shipment originated at Pier 24.

The Government asserted that the order on the first petition was wrong and was overruled by the Commission upon its merits, and it is on that view that the Government formerly sought to sustain the Commission's action.

This view, however, is not sustained by the report and is contrary to the position taken by the Federal Company before the Commission, and by that company and the Commission in this Court. The keystone of the Federal Company's complaint in the proceeding before the Commission and of the Commission's report was that the Federal sugar shipments now originate at Pier 24, a point within New York City lighterage, thereby differentiating the case from the original case, and enabling the Commission to award the relief indicated in the Commission's Report and order.

In the original case it was held (Record, 24 *et seq.*):

"1. By their lighterage regulations defendants have, in the only available manner, extended their lines to New York, but such extension results from the exercise of business discretion, not from compliance with any requirement of the act to regulate commerce; and by such extension defendants incur no liability under the act to extend their lines to Yonkers or other nearby communities.

"2. The identity of ownership between Jay Street Terminal in Brooklyn and the adjoining refinery in Brooklyn is a relationship which should be subjected to the closest scrutiny. The only inference which

can be drawn from the present record is that the Jay Street Terminal does not earn in excess of a reasonable return upon the investment. The 15th section of the act clearly implies that a just and reasonable allowance may be made to the owner of property transported when such owner renders a service connected with or furnishes an instrumentality used in the transportation, and nothing has been made to appear which indicates that the allowance in question exceeds the authorized measure of compensation."

Commissioner Clark, concurring (Record, p. 32), states that he fully agrees with the views of the majority on the question of extending lighterage limits to Yonkers, and also with conclusion of the majority report that the railroad companies should not be required to pay the Federal Company for lighterage to their terminals in the lighterage limits. He bases that view "upon the fact that complainant's factory is outside the lighterage limits, and that therefore no obligation rests upon the defendants to either go and get complainant's shipments or hire another to perform that service," and states that if the Federal Company were a shipper within lighterage limits, it would be entitled to relief.

The only theory on which the conclusions and order of the Commission in the present case are based is that the Federal Company is now a shipper within lighterage limits and consequently entitled to relief.

It is stated in the report (Record, p. 44): "*A careful examination of the report of the majority in the original case and of the concurring and dissenting opinions will conduce to a more accurate understanding of the case, as well as the grounds on which were based the divergent*

views entertained in the Commission upon the facts then before us." It is further stated (Record, p. 46) that the complaint in this proceeding is *based upon* the changed method of handling the traffic by the Federal Sugar Company.

The Commission after holding that the Federal Company shipments in legal effect originate at Pier 24 and that the carriers, therefore, must accord them an allowance, says:

"Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. *That, however, is a question that need not be discussed, for we have found that the complainant now lighters its sugar from Pier 24, which is within lighterage limits*" (Record, p. 56).

The Commission further state in their report (Record, pp. 47 and 48):

"On the record in the former proceeding, as hereinbefore explained, it appeared that the lighterage movement commenced at Yonkers, which is outside the lighterage limits. On the record now before us *the complainant contends that the lighterage movement to the receiving stations west of the river commences at Pier 24*, where the complainant gives its shipping instructions to the lighterage company. Without entering here upon any discussion of the importance of the fact in the disposition of this proceeding, it will suffice to say that *we accept the complainant's contention that the sugar is now being lightered to defendants at Jersey City from Pier 24, which is inside the lighterage limits.*"

The Federal Sugar Company, in its brief before this Court (Brief, pp. 27 *et seq.*), speaking of the device adopted by it for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers but from Pier 24 and the effect of this expedient upon the decision of the Commission, says:

“ The plan was adopted in order to meet the views of the Commissioner who had cast the deciding vote against the company in the case at first submitted. * * * But he concurred with the majority on the sole ground that the Federal refinery was not located within the lighterage limits. * * * Having in mind the rule applied in the case of *Gulf, C. & S. F. vs. Texas* (204 U. S., 403), counsel advised the Federal Company to have the shipments from the Yonkers refinery consigned to itself at its head offices, and then, and not till then, to initiate the interstate transportation to which alone these carriers are interested. This course was adopted, *with the result that Commissioners Clark and Cockrell concurred in the majority report issued in the second case presented to the Commission.*”

It is further stated (Brief, p. 29) that the purpose of the Federal Sugar Company, “ in adopting the new method of shipment ” was

“ to obtain the benefit of favorable rates imposed on the carriers by a duly constituted authority.”

Mr. Chief Justice White, in delivering the opinion of this Court when this case was up on appeal from the order of the Commerce Court granting a temporary injunction, stated as one of the facts in the case that,—

“ As a result of the (first) decision of the Commission the lighters of the Ben Franklin Trans-

portation Company were stopped en route from Yonkers at Pier 24, North River, where certain formalities with reference to shipping orders were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers but from Pier 24, North River, a point within lighterage limits. A new complaint was filed with the Commission setting forth the same grounds of discrimination as the prior one, *but on the theory that the decision of the Commission did not apply because the shipments of the Federal Sugar Refining Company were now lightered from Pier 24, a point within lighterage limits and not from Yonkers. The Commission held as a matter of law that the stoppage of the lighters of the Ben Franklin Transportation Company for instructions at Pier 24 differentiated the case from the former ones and made the following order.*" (The order which is the subject matter of the controversy.)

This would seem to dispose of the contention that "the Commission did not base its action on this changed mode of business by the Federal Company," but overruled its first decision and based its action on such reversal.

The Commission further found that in view of their conclusions in the report in the present case, it was unnecessary "to consider the petition for a rehearing of the former case" (Record, p. 60).

Any comparative disadvantage of the Federal Sugar Refining Company arises from the location of its Refinery at Yonkers beyond the lighterage limits and off of the lines of these railroads, and not from the arrangement between the railroads and the Jay Street Terminal.

As the Commission recognizes (Record, p. 48), the fundamental basis of the Federal Sugar Refining Com-

pany's complaint is that it costs it three cents per cwt. to get its sugar from Yonkers to the receiving stations of the railroads on the Jersey Shore, while Arbuckle Brothers' shipments are brought to the Jersey Shore by the Jay Street Terminal for the railroads and at their expense.

This three cents per cwt. cost to the Federal Sugar Refining Company represents the cost to it of getting its sugar down from Yonkers, and the real effort of the Federal Sugar Refining Company is to get its refinery at Yonkers put on the same basis as if it were within lighterage limits by forcing the railroads to assume this cost, the allowance under the Commission's rule being in excess of such cost.

This is clearly shown by the facts as well as by the admission of counsel for the Federal Sugar Refinery Company.

"Counsel for the complainant (Federal Sugar Refining Company) deliberately stated upon the argument that his client would be in no respect benefited if the operation of that terminal (Jay street) were to pass into the hands of a third party or were to be taken over by the defendants themselves" (Commissioner Prouty, Record, p. 64).

The grievance is therefore not on account of the payments made to the Jay Street Terminal.

It is not on account of any failure or refusal of the railroads to lighter themselves the sugar of the Federal Sugar Refining Company, from any point within lighterage limits, for they are and always have been willing to do that, and offer to do it under their filed and published tariffs, and the Federal Sugar Refining Company has never availed itself of this right. This shows clearly that the Federal Sugar Refining Company can get its sugar

from Yonkers to the Jersey shore terminals as cheaply as it can get it to any point in lighterage limits.

The grievance is solely on account of the refusal of the railroads to extend their lines to Yonkers, by absorbing more than the cost of three cents per cwt., which the Federal Sugar Refining Company is under to get its sugar down from Yonkers.

The Commission has obviously overlooked the fact that the 3 cents which the Federal Sugar Refining Company pays, is paid for getting its shipments down from Yonkers and that the handicap under which that Company operates in competing with Arbuckle Brothers is due to the location of the refinery at Yonkers.

It is contended by the Counsel for the Commission that the above admission of counsel for the Federal Sugar Refining Company is not in accordance with the fact, and he argues that the so-called undue discrimination under which the Federal Company is laboring would be cured if the Jay Street Terminal were taken over by these appellees (Commission's Brief, pp. 40, 41). Would the alleged burden of the Federal Company be any less, if these appellees took over the operations of the Jay Street Terminal and floated the sugar of Arbuckle Brothers from that terminal with their own equipment? Surely not, for it is admitted that the sums paid that terminal by these appellees do not aggregate a reasonable return upon the investment, and that it costs the Federal Sugar Company 3 cents per cwt. to get its sugar to Pier 24. This cost would not be reduced if the Jay Street Terminal were taken over by the Railroad Companies, nor would the partnership of Arbuckle and Jamison receive less revenues. Presumably it would be to their advantage if they could dispose of the property, and devote the proceeds to a more profitable business. If

there was any benefit to be derived from the allowances paid for the operation of this terminal above the privilege of free lighterage, is it not strange that the American Sugar Refining Company has not complained of the preferred position of Arbuckle Brothers? If the refinery of the Federal Company were located within lighterage limits, it would be as acquiescent as the American Sugar Refining Company. Its sole disadvantage in shipping over the lines of these appellees is the location of its refinery at Yonkers. In its first complaint to the Commission it indicated that the remedy for the situation was the extension of the free lighterage to Yonkers (Federal Co.'s Brief, p. 6).

It has contended throughout these proceedings that it should be placed upon an equality with its competitors located within the lighterage limits. The Commission refused to recognize the justice of its first complaint that it should be granted this privilege of free lighterage from Yonkers. But now, upon the basis of the device adopted by it of stopping the lighters of its agent at Pier 24, the Commission not only places it upon an equality with its competitors located within lighterage limits, but extends to it a bonus of $1\frac{1}{5}$ cents per cwt. on all the sugar it may ship over the lines of these Railway Companies to points west of Trunk Line termini. In its desire to place this concern upon an equality with its competitors the Commission has gone to the extreme of creating an obvious and patent preference in its behalf and has handicapped its competitors in selling their sugar to the extent of $1\frac{1}{5}$ cents on every hundred pounds of sugar sold by them in competition with the Federal Company in the territory west of Buffalo. That concern already has a natural advantage in its location at Yonkers on the line of the New York

Central Railway and to this has been added the Commission created preference above referred to.

To be sure the order permits an alternative, to abandon payments to the Jay Street Terminal on Arbuckle Brothers' shipments, but such payments are lawful, made pursuant to a contract which is greatly in the public interest, and which would be violated by the abandonment of such payments, and it is submitted that the Commission has no power to impose as a condition, upon the exercise of a legal right, that which it could not impose by a direct order. Even if there be unlawful discrimination or preference the Commission has no power to remedy it by an order in the present form.

POINT 3.

The service performed by the Federal Sugar Refining Company through the medium of the Ben Franklin Transportation Company is not a transportation service of the Railroad Companies, but is wholly accessory and cannot lawfully be paid for by these appellees.

The order of the Commission requires these appellees to pay an allowance to the Federal Sugar Refining Company on its sugar brought to their rail terminals on the western shore of the Hudson River by the lighters of the Ben Franklin Transportation Company, providing the payments to the Jay Street Terminal for the service it performs on the sugar of Arbuckle Brothers are continued. The Ben Franklin Transportation Company is an indepen-

dent boat line and acts as the agent of the Federal Sugar Refining Company in bringing the sugar to the rail terminals of these appellees. The sugar lightered by the Ben Franklin Transportation Company is not delivered to these Railroad Companies until it reaches their rail terminals on the western shore of the Hudson. It is at these terminals that the sugar is turned over to them and there the bills of lading are signed by them, evidencing the receipt of the sugar and their contract for its transportation. The Commerce Court agrees with this proposition as it held "we must find as a matter of law that the transportation of Federal sugar by petitioners does not commence until it is delivered to them at their rail termini" (Record, p. 117). Under the rulings of the Commission and the decisions of the Federal Courts this service is accessory and cannot lawfully be paid for by these appellees.

In re Allowances for Transfer of Sugar, 14 I. C. C., 619, 627.

Wight vs. United States, 167 U. S., 512.

Chicago & Alton Ry. Co. vs. United States, 156 Fed. Rep., 558.

General Electric Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep., 237.

Solvay Process Co. vs. D. L. & W. R. R. Co., 14 I. C. C. Rep., 246.

In the first cited case the Commission said, on page 627:

"All the tariffs purport to make the allowance as compensation for transfer. It necessarily follows that if the allowance is to be sustained the transfer of goods to the possession of the carrier must be held to be the carrier's duty for which the shipper making the transfer is entitled to compensation. Such is not the law and the first to resist an attempt to impose such duty upon the carriers would be the

carriers themselves. Within the present year this Commission has decided at least two cases in favor of carriers involved in this proceeding and has held that the delivery of goods to a carrier and the receipt of goods from a carrier are duties devolving upon the shipper, for which the carrier cannot be compelled to pay, or carriers to undertake to make to shippers allowances based upon the performance by the shippers for themselves of services which they are legally bound to do for themselves is for the carriers to violate the act to regulate commerce."

It is true that these appellees hold themselves out as common carriers from all points within the lighterage limits established by them in New York Harbor in accordance with the regulations and rules governing such lighterage service contained in the tariffs on file with the Commission. Under such rules they would take delivery of the sugar of the Federal Sugar Refining Company at Pier 24, North River, the point at which the lighters of the Ben Franklin Transportation Company stop on their way from Yonkers to the terminals of these railroad companies, and having accepted delivery would perform a transportation service in lighterage it from Pier 24 to these terminals. The Federal Sugar Refining Company, however, does not offer its sugar to these petitioners at Pier 24, but prefers to offer it to them at their terminals on the western shore of the Hudson River. In other words, the Federal Sugar Refining Company volunteers to perform the lighterage movement itself from Pier 24 to these terminals, instead of requiring these appellees to do it. Is the Federal Sugar Refining Company entitled to payment for this service which it volunteers and which these railroad companies would perform, if asked to do so? The Commission has

held not in the case of General Electric Company vs. N. Y. C. & H. R. R. Co., *supra*, where Commissioner Harlan, writing the opinion, said, on page 244:

"The complainant is not entitled to compensation as demanded by it in the complaint or on any other ground developed upon the record. It assumed charge of the work of switching cars between its storage tracks and various points within the inclosure of its plant, not because the defendants refused longer to spot cars for it or because they did not give the complainant a reasonably good service in that respect, but simply because the growth of its business to vast proportions, the multiplication of its buildings, and the extension of its switching arrangements within the inclosure required the complainant to take charge of the interior switching for itself and to exclude the defendants from its plant. And it now demands compensation for doing that which it claims the defendants are under the obligation to do, but which it does not and could not permit them to do. On that ground alone the complaint is without merit. *Relief against a defendant must ordinarily be predicated upon his failure or refusal to do what he is legally bound to do and not upon the fact that the complainant has volunteered to do it for him.*"

Such an allowance to the Federal Sugar Refining Company as provided for by the Commission's order in this case is under the above authorities clearly unlawful under Section 2 and Section 6 of the Act to Regulate Commerce. The Commission has no power to direct such a payment to be made, either as a condition of continuance of payments to the Jay Street Terminal or otherwise.

POINT 4.

The service performed for the Railroad Companies by the Jay Street Terminal is a transportation service as to sugar shipped by Arbuckle Brothers as well as other shipments, and is not an accessorial service. Arbuckle Brothers are, therefore, shippers from Jay Street Terminal station, New York City, and not from the Railroad Companies' stations on the New Jersey shore. There can be, therefore, no violation of Section 2 of the Act to Regulate Commerce.

The lighterage or floatage service performed by the Railroad Companies or by the Jay Street Terminal and other terminal companies for them is not accessorial, but a part of the transportation, and the railroads themselves extend to these New York and Brooklyn stations in a legal sense and by statutory definition.

The Law of the State of New Jersey provides as follows:

“Where the terminus of a railroad company may be on the shore of any river or navigable water of this State, such company may establish and operate ferries for the transportation of persons and property on or across the same, subject to the rates of fare and tolls provided in this act on railroads, and may buy or build vessels and boats and do all things necessary or convenient to carry on such ferry, or may contract with other ferry companies for the transportation of the passengers and freight of such railroad company.” Section 19, Chapter 257 of the Laws of New Jersey of 1903. “An Act concerning Railroads (Revision of 1903).”

The Law of the State of New York provides as follows:

"Any steam railroad corporation, incorporated under the laws of this state, with a terminus in the harbor of New York, may purchase or lease boats propelled by steam or otherwise, and operate the same as a ferry or otherwise, over the waters of the harbor of New York, but this section shall not be construed to affect the rights of the city of New York." Section 84 of Chapter 481 of the Laws of New York of 1910, being Chapter 49 of the Consolidated Laws and known as the Railroad Law.

The Act to Regulate Commerce provides as follows:

(Section 1).—"The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

It is undisputed that Jay Street Terminal is the union freight depot of these appellees used by many important shippers and receivers of freight in the Borough of

Brooklyn. It is located at the foot of Bridge street, Brooklyn, on the East River, having a water frontage of 1,200 feet and a depth of 600 feet. Its equipment consists of a large freight house, two Baldwin locomotives, three tug boats, two steam lighters, ten barges and six car floats. The capacity of the yard is 235 cars. During the first six months of 1907 the bills of lading issued by the Jay Street Terminal for shipments of general merchandise numbered 92,622. There were 769 different consignees and 560 shippers during this same period (Record, pp. 4 and 6).

Jay Street Terminal is owned by a copartnership composed of William A. Jamison and John Arbuckle, the same men who compose the copartnership of Arbuckle Brothers, and although the two copartnerships are, as a matter of law, two distinct and separate entities, the Commission in its opinion ignores this distinction and treats the Jay Street Terminal as the property of Arbuckle Brothers. With this explanation the following excerpts are given from the report of the Commission which clearly indicate that it considered the Jay Street Terminal as the public freight house of these appellees :

"Under a contract with the defendant carriers Arbuckle Brothers operate the property as a freight station for the defendants. For that use of the dock and for their services in conducting it as a freight station and in floating and lightering shipments between the dock and the regular terminals of the defendants in Jersey City, Arbuckle Brothers receive from the defendants allowances ranging from 3 to 4 1/5 cents per 100 pounds on all merchandise passing through the terminal whether inbound or outbound" (Record, p. 45).

"So far as the general shipping public is concerned, the Arbuckle dock may doubtless now be

regarded as a public receiving station of the defendants." * * *

"Arbuckle Brothers not only operate their dock for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular stations of the defendant on the west shore" (Record, pp. 54 and 55).

This employment of Jay Street Terminal to act as the public freight station of these railroad companies in receiving and delivering freight in the Borough of Brooklyn and to perform floatage and lighterage service between Jersey City and Brooklyn was perfectly lawful. It has been held both by the Commission and the Courts that railroads may secure and maintain freight depots by contract with shippers, and that such depots thereby become legally and to all intents and purposes the freight depots of the railroads.

Central Stock Yards Co. vs. L. & N. Ry. Co., 192 U. S., 568.

R. R. Com. of Ky. vs. L. & N. Ry. Co., 10 I. C. C. Rep., 173.

Cattle Raisers Assn. vs. C. B. & Q. R. R. Co., 11 I. C. C. Rep., 277.

It was the unanimous opinion of the Court below that the services performed by the Jay Street Terminal were transportation services and that Arbuckle Brothers were shippers from that terminal in Brooklyn as distinguished from the terminals of these appellees on the Jersey shore. It is said by Judge Mack :

"The Commission in its report does not clearly indicate whether it deems the transportation of the Arbuckle sugar to begin in New York, or in Jersey City. It is conceded by counsel that this is a ques-

tion of law to be determined by the Court. * * * I concur in the conclusion of the majority of the Court that this transportation begins in New York" (Record, p. 119).

The Commission argues, though as stated above it does not formulate a definite conclusion to that effect, that the Jay Street Terminal cannot be a public station of the Railroad Companies, as to shipments made by Arbuckle Brothers, and that the transportation of such shipments up to the station on the New Jersey shore cannot be a transportation service, and must be accessorial. It is "inclined" to this view, because, as it states, such shipments belong to Arbuckle Brothers, and incidentally because the Jay Street Terminal could not be expected to be used as a public station by the Federal Sugar Refining Company and because the Jay Street Terminal, which the Commission regards as identical with Arbuckle Brothers, contracts to indemnify the Railroad Companies severally against loss or damage to shipments while in its charge (Record, pp. 52-55).

If this is a conclusion of the Commission it is erroneous in law and the order, so far as based upon it, is beyond its power.

It is the same error that the Commission fell into in the elevator allowance cases, covered by this Court's opinion in the so-called Peavy cases (Interstate Commerce Commission vs. Diffenbaugh and other cases, 222 U. S., 42), namely, the erroneous theory that a shipper may not lawfully perform a part of the transportation service even for a reasonable compensation, if he derives any incidental advantage. Comparison of the history of the steps by which the Commission finally reached the opinion that it was unlawful to pay a reasonable amount for the elevation

of grain in transit where such grain was treated by its owners to the elevators, with the reasoning employed by the Commission in the two cases of the Federal Sugar Refining Company, shows the same evolution of the final opinion, and the same change of view to which this Court refers in the Peavey decision (222 U. S., 42, at p. 45).

When the Commission first considered the contracts entered into by the Union Pacific Railroad Company with Peavey & Company, under which the latter was employed to elevate grain in transit at 1 1/4 cents per hundred pounds it held that the compensation for the service was not unreasonable, that the service was one which the railroad company could perform itself or could hire others to perform for it, and that no unjust discrimination could be predicated upon the fact that Peavey & Company might obtain incidental advantages in connection with the elevation of the grain (10 I. C. C., 309). This case was decided by the Commission before the amendment to the Act to Regulate Commerce making elevation one of the transportation services to be performed by the carrier and permitting the carrier to employ a shipper to furnish the facilities for the elevation. The Commission at that time expressed its views in regard to arrangements by which a shipper was employed by a carrier to perform a service in connection with his own freight, as follows: "It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating

statute may not be violated, because any resulting discrimination may not be undue, but the situation created cannot be wholly satisfactory."

Upon a rehearing of the case the Commission for the purpose of placing all other shippers of grain on an equality with Peavey & Company ordered the Union Pacific Railroad Company to reduce the payment of 1 1/4 cents per one hundred pounds to three-quarters of a cent per one hundred pounds, which it found to be the cost of the elevation. The Commission again expressed itself as being very much opposed to the employment of a shipper to perform a transportation service although the Act to Regulate Commerce had been amended at the time of this rehearing to expressly permit of such employment and a reasonable payment therefor. Its disapproval was based upon the proposition that the shipper owning the elevator has the opportunity while elevating the grain to at the same time grade, clean and clip it, thus obtaining an advantage over other shippers of grain who are not elevator owners (In the matter of allowances to elevators (12 I. C. C. Reports, 85).

Upon the second rehearing in this case the Commission took the final step and held that it was unlawful for the Union Pacific Railroad to make an allowance to Peavey & Company upon grain elevated in transit which was mixed, treated, stored, weighed or inspected in the elevator (14 I. C. C., 315). The effect of this last order of the Commission was extended to all allowances paid for the elevation of grain by carriers where such grain was treated during the course of elevation (see Traffic Bureau Merchants Exchange of St. Louis vs. Chicago, B. & Q. R. Co., 14 I. C. C., 317 and 510).

In that case the Commission step by step with the idea

of absolutely equalizing the condition of all competing shippers of grain turned absolutely about in its position and finally reversed its first decision, which was the correct one, and by this reversal made a determination that it was absolutely unlawful to pay for services which the Act to Regulate Commerce expressly authorizes the carriers to compensate the shippers for performing (Section 15).

So the Commission has reached the same erroneous position with respect to the payments made by these appellees to the Jay Street Terminal, for upon the first complaint of the Federal Sugar Refining Company the Commission held the arrangement with the Jay Street Terminal a lawful one; that the payments made for the services performed by that Terminal were not unreasonable and that, therefore, unjust preference could not arise in favor of Arbuckle Brothers and an unjust disadvantage be imposed upon the Federal Sugar Refining Company as the result of such contract proceeding altogether on the basis that the Jay Street Terminal in transporting Arbuckle Brothers' shipments for the railroads, was performing part of the railroads' transportation service.

Upon the second complaint with absolutely no new factor before the Commission, with the exception of the hollow device of stopping the shipments of the Federal Sugar Refining Company, while in course of lighterage from Yonkers to the terminals of these appellees on the western shore of the Hudson River, at Pier 24, the Commission has condemned the contract with the Jay Street Terminal, as unlawful unless these appellees pay as much per ewt. to the Federal Sugar Refining Company for bringing its sugar to their rail terminals as they pay for all the services performed by the Jay Street Terminal in acting as a public

freight station and in lightering all shipments received through that station from Brooklyn to their railroad terminals, a compensation which if paid to the Federal Sugar Refining Company, will return to it the entire expense which it is put to under its contract with the Ben Franklin Transportation Company of bringing its sugar from Yonkers to the railroad terminals, and on shipment which are destined to points west of Buffalo and Pittsburg, will give the Federal Sugar Refining Company a profit 1 1/5 cents for the accessorial service which it has performed by the Ben Franklin Company.

The Commission's decision is based on its erroneous conception of the grounds on which, under the statute, an advantage may be pronounced undue, and on its mistaken view that because of possible incidental advantages, the employment of the owner of property transported to render a service connected with such transportation, and to furnish instrumentalities to be used therein, for no more than a just and reasonable compensation for such services, and the use of such instrumentalities creates undue preferences and unjust discrimination.

Upon this mistaken view of the law it "is inclined to think," in the present case (pp. 52, 55), that the employment of Jay Street Terminal to perform such transportation services is sufficient to deprive them of their character as transportation services, and make them purely accessorial services, so far as they relate to property shipped by owners of such terminal. In other words, that the fact that the owner is employed to render services which otherwise would be transportation services may deprive them of their character as transportation services, and that the Commission may prohibit the payment of even a just and

reasonable compensation therefor, on the ground that the services cannot be considered transportation services, and that therefore any payment therefor is an unlawful allowance.

This view would, to a large extent, nullify the provision of Sec. 15, expressly authorizing and recognizing the right to employ owners of shipments to perform such services, which was adopted at the instance of the Commission.

In its Report to Congress in 1905 it presented the subject as follows:

"There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier by paying such owner an extravagant sum for the service rendered thereby, prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of excessive mileage upon the private car which conveys the property of the owner of the car.

"Our investigations leave no room for doubt that all these methods are, at the present time, more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. *We hesitate to recommend at this time so drastic a measure as that.* Assuming that such a law would be a constitutional exercise of authority it would seriously interfere with

property rights which have grown up under the present system. Moreover there are many instances in which the services can be rendered or the facility furnish more advantageously, both to shipper and railway, and without injury to the public, if provided by the shipper himself. We do think, however, the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate and any remedy is extremely difficult of application but nothing better appears to be available."

Congress thereupon amended Sec. 15 in accordance with this recommendation.

Subsequently the Commission changed its view, and after a process of evolution adopted the erroneous conception above indicated, as shown by its decisions in, among other cases, this case and the "Grain Elevation" cases, in which latter cases this Court held :

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in sec. 15, the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion)."

Interstate Commerce Com. vs. Peavey, 222 U. S., 44.

The Commission in its brief in this Court (Brief, pp. 43, 51, 52) reiterates, in the same language, the views it had previously unsuccessfully urged in this Court in the Peavey cases, as to the purpose and effect of the amendment to Section 15, and that the incidental advantages from the making of a contract with one shipper to perform services for a reasonable compensation would make the contract unlawful as against other shippers if they were not afforded the same opportunities and the same advantages.

It would seem from the position taken by the Commission in this case, and by its comments on the decision of this Court in the Peavey and Diffenbaugh cases in its annual Report to Congress for 1911 that it still retains an erroneous conception of the purpose and effect of this provision of Section 15, as the same has been declared by this Court, and as to the grounds on which under this statute an advantage may be declared undue.

In that report to Congress the Commission, after quoting from the opinion of the Court, says :

"As we understand this language, the court holds that the Commission is powerless to forbid a carrier from paying this allowance, although it does result in a preference to the one receiving it, for the reason that Congress has approved, by the terms of the statute, this course of proceeding. In other words, the Supreme Court holds that a statute which was enacted for the express purpose of forbidding discrimination in favor of the owner of an elevator has permitted and perpetuated a possible discrimination in that very particular.

"The Court declares that 'the law does not attempt to equalize fortune, opportunities, or abilities.' We had never supposed it to be the intention

of the act to regulate commerce, to equalize fortune or ability, but we had supposed that a cardinal purpose of that act was to equalize opportunity, in so far as that opportunity was afforded, as here, by a railroad subject to the act, and we desire to call attention to the practical consequences of this decision" (p. 51).

The decision of this Court rests upon the broad ground that, as a matter of law, the carrier has a right to employ the owner of property to perform services connected with "transportation" as defined in the act, and that the Commission has no power to prohibit payment of a reasonable and just compensation therefor. It would seem to be controlling in the present case.

The Commission's theory also involves errors of law on the incidental points on which it is based. The practical objections to the use of the Jay Street Terminal facilities by the Federal Sugar Refining Company are such as must exist to a greater or less degree whenever a shipper performs a transportation service for a carrier on shipments of others who may be his competitors. Such conditions existed undoubtedly in a number of the cases above cited, but they furnished no legal reason why the shipper could not perform a part of the carrier's transportation service as to the shipper's own goods.

In this connection the Commission gives what purports to be a quotation "in substance" of an offer of the Railway Companies to receive the Federal Sugar Refining Company's shipments at the Jay Street Terminal (Record, p. 53). The use of quotation marks is unfortunate, as the Commission has misconceived the carrier's offer, and the Commission's statement may give the impression that the carriers' offer was limited to, or had some special reference to the Jay Street Terminal, which is not so.

The carriers' offer is, and always has been, to receive shipments of the Federal Sugar Refining Company at any public station in New York City, or at any accessible point within lighterage limits under and in accordance with their tariffs, on file with the Commission (Record, p. 11).

It was never supposed that the Federal Sugar Refining Company would send any sugar to Jay street, Brooklyn, for shipment, no matter who operated the Terminal at that point. The Railroad Companies have numerous public stations in New York as well as on the Jersey shore, which the Federal Sugar Refining Company's sugar would have to pass by to reach Jay street, and which it does pass even to reach Pier 24, North River (see map attached to this brief which shows railroad stations, individual and joint, and lighterage limits). The Federal Sugar Refining Company in fact need bring its sugar only so far south as the northern lighterage limit to secure its receipt for shipment at that point by the Railroad Companies.

The assumption of identity of the Jay Street Terminal and Arbuckle Bros. is likewise erroneous. It is true that the partners comprising the two partnerships are the same, but they are conducting separate businesses with separate organizations and employees and the delivery of shipments from the partnership of Arbuckle Bros. by its employees, to the partnership of the Jay Street Terminal through its employees, is a perfectly well defined transaction.

The Commission's theory is legally erroneous in its assumption that the agreement of Jay Street Terminal to indemnify the Railroad Companies against loss or damage to shipments made by Arbuckle Brothers while in its possession affects the character of the service as a transporta-

tion service (Record, p. 54). Such assumption is of course based on the assumed identity of the Jay Street Terminal and Arbuckle Brothers, but apart from that, such assumption of liability is a material and even an essential element in the transportation service if assumed completely for the time being. It cannot legally affect the character of the service as transportation service; it flows from it.

The case of Missouri Pacific Railroad vs. McFadden, 154 U. S., 155, cited by the counsel for the Federal Company (Brief, p. 17) is not apposite. In that case the Compress Company, in whose possession the cotton was when destroyed, was the agent of the shipper, and here the Jay Street Terminal acts not as the agent of the shipper but of the carrier.

The Commission also falls into legal error in assuming that all shipments made by Arbuckle Brothers belong to them.

Approximately four-fifths of the shipments of sugar made by Arbuckle Bros. through Jay Street Terminal are sold f.o.b., Brooklyn, and become the property of the consignee immediately upon delivery to the terminal (Record, pp. 89, 111). As to any shipments to consignees other than Arbuckle Bros. the legal presumption is that the consignees become the owners upon delivery to the Jay Street Terminal as agent for the carriers, and as to the shipments of which Arbuckle Bros. are the consignees as well as the consignors, referred to by Judge Mack as a "comparatively small percentage," the title thereto can be transferred by Arbuckle Bros. immediately after the bills of lading are issued, as pointed out by Judge Mack (Record, pp. 119-120).

Arbuckle Brothers being, therefore, as matter of law,

shippers over the lines of the Railroad Companies from and through the Jay Street Terminal, they are obviously shippers from a different point and under different circumstances and conditions than the Federal Sugar Refining Company, whose shipments first reach the Railroad Companies in New Jersey, as more fully shown herein under Point 6. For this reason, if for no other, there can be no violation of Section 2 of the Act to Regulate Commerce in this case.

The order of the Commission is of course inconsistent in permitting the continuance of what it apparently considers an accessorial allowance to Arbuckle Brothers on condition of payment of another similar illegal allowance to the Federal Sugar Refining Company. It was said by the Court below, "We must indulge in the presumption that the Commission found nothing unlawful in the payments made by the petitioners to the Jay Street Terminal under the facts appearing in the record, or it would not have framed its order in the alternative (Penn. Refining Co. vs. W. N. Y. & P. R. R. Co., 208 U. S., 208; East Tenn., etc., R. R. Co. vs. Interstate Commerce Commission, 181 U. S., 1; Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 190 U. S., 273; Louisville & Nashville R. R. Co. vs. United States, 197 Fed., 58-60, Record, pp. 117, 118.)"

If, as contended by appellants, the Arbuckle Brothers shipments were delivered to the Railroad Companies only at their stations on the New Jersey shore, and the railroad transportation began at those points, and the payments made to Arbuckle Brothers, were for purely accessorial services and not for transportation services within the meaning of Section 15, then such payments would clearly be in violation of Sections 2 and 6 of the Interstate Com-

merce Act and unlawful. In such case the Commission would have no power to make an order permitting the continuance of such violation of the law upon condition that the Railroad Companies violate it further by making like unlawful payments to one of the other shippers delivering property at such New Jersey stations for transportation. The sole power and the duty of the Commission in such case would be to enforce the provisions of the statute by preventing a continuance of such payments through issuing a "cease and desist" order, or otherwise.

POINT 5.

These appellees may lawfully employ the Jay Street Terminal to furnish public station and terminal facilities and service with respect to shipments of Arbuckle Brothers without being compelled to make payments to the Federal Sugar Refining Company on its shipments at the same rate per cwt. as paid to the Jay Street Terminal, and therefore the order of the Commission is beyond its power.

A.

The fact that the Jay Street Terminal furnishes a public station and terminal service constitutes a difference in circumstances and conditions which the Commission was bound to consider and did not consider.

It is well settled that the entering into a contract with one shipper to furnish station facilities does not result in

a violation of the provisions of the Act to Regulate Commerce forbidding undue preferences and advantages even if similar contracts are not made with all competing shippers in the same locality.

Central Stock Yards Company vs. Louisville & N. Ry. Co., 118 Fed. Rep., 113, at p. 117; aff'd 192 U. S., 568.

Covington Stock Yards Co. vs. Keith, 139 U. S., 128, p. 136.

Butcher's and Drover's Stock Yards Co. vs. Louisville & N. R. Co., 67 Fed. Rep., 35.

United States vs. Delaware, L. & W. R. Co., 40 Fed. Rep., 101.

Consolidating Forwarding Co. vs. Southern P. Co. *et al.*, 9 I. C. C. Rep., 182, p. 206e.

Worcester Excursion Car Co. vs. The Penn. R. Co., 3 I. C. C. Rep., 577, p. 584.

Re Transportation of Fruit, 10 I. C. C. Rep., 360.

An unjust discrimination or an undue preference is not created by the action of a railroad company in employing a shipper to perform a part of the transportation service, when the shipper is paid a compensation that is reasonable for the performance of the service, simply because other shippers who are not in position to perform the same transportation service may be subject to disadvantages. For example, it is perfectly lawful to pay a shipper for elevating his own grain in transit through his own elevator, even though he may be able to treat his grain during the elevation and thus secure incidental advantages over another competing shipper who does not happen to own an elevator. These incidental advantages accrue because of the fact that one shipper owns the elevator and the

other does not. The carrier paying the allowance does not discriminate against the shipper who cannot perform the same transportation service, if the service is offered to all.

F. H. Peavey & Co. vs. Union Pac. R. C.,
176 Fed. Rep., 409; aff'd 222 U. S., 42.

This is not a case, where a payment, offered under published tariffs, for a specified transportation service, is withheld from one shipper who can and does furnish the service, because of an arbitrary rule of the carrier, as in the case of Union Pacific Railway Co. vs. Updike Grain Co., 222 U. S., p. 215. Arbuckle Brothers are not employed to float their sugar from Brooklyn to the rail ends of these appellees on the Jersey shore. Nor is any compensation offered or paid to that copartnership or any other shipper in the Harbor of New York for the performance of the floatage or lighterage service alone. The Jay Street Terminal is employed as a public freight station of these railroads and as part of its duties floats or lighters all freight shipped through that station to the terminals of these appellees. Even if, as a matter of law, undue discrimination and unlawful preference would result from the employment of the Jay Street Terminal as a public freight station, because of the relation of that station to the copartnership of Arbuckle Brothers, unless these appellees made similar contracts of employment with all other competing shippers of sugar who had the facilities for a public freight station and the equipment to handle the shipments of the public, still the Federal Sugar Refining Company is not subjected to unjust discrimination or undue or unreasonable prejudice or disadvantage until it offers to furnish facilities similar to

those owned by the Jay Street Terminal and used by the shipping public at some point within the lighterage limits of New York Harbor, and this was the conclusion of the Commerce Court.

The fact that the Jay Street Terminal is a public freight station and furnishes public terminal facilities differentiates the situation as a matter of law from the case where an allowance is made to a shipper merely for performing a part of the transportation service on its own goods. The payment to the Jay Street Terminal is made for services more extensive and of a different character.

The aggregate amount paid to the Jay Street Terminal is compensation for the entire service performed by it for the carrier in connection with shipments of the general public as well as shipments made by Arbuckle Brothers. The fact that the compensation is measured by tonnage and that Arbuckle Brothers' shipments are included in such tonnage does not change the situation. The compensation is not 3 or 4 1/5 cents for the service on each cwt. of the Arbuckle Brothers' shipments; the tonnage is a mere measure of the total compensation to be paid for all services, physical, clerical and supervisory, and for the use of the property engaged in the general public service.

Such circumstances and conditions are circumstances which differentiate, within the meaning of the Interstate Commerce Act as a matter of law, like the existence of controlling competition (T. & P. Ry. vs. I. C. C., 162 U. S., 197). Therefore, there can be, as a matter of law, no undue and unreasonable discrimination or undue preference where such differentiating circumstances exist and where the difference in treatment of the two shippers does not go beyond what is produced by such circumstances.

The Commission is bound to give such differentiating circumstances due weight. It has not done so in this case, partly because it has fallen into the same error as in the cases involving payments for elevation to Peavey & Company and others, and partly because it seeks to avoid the legal effect of the character of the service performed by the Jay Street Terminal on shipments made by Arbuckle Brothers. Both of these points are discussed elsewhere in this brief.

B.

The Circumstances and Conditions with respect to the physical handling by the Railroad Company of shipments made by Arbuckle Brothers and by the Federal Sugar Refining Company are different, and the shipments do not get into "the actual physical possession of the defendants on the Jersey Shore under practically similar conditions," as stated by the Commission (Record, p. 58).

It will be noted that the Commission does not state that the conditions referred to are the same, but only that "they are *practically* similar."

The shipments made by Arbuckle Brothers are, of course, handled by the Jay Street Terminal *for* the Railroad Companies before arriving at the stations of the Railroad Companies on the Jersey Shore in the sense that after being loaded into cars by Arbuckle Brothers at Jay street, the Jay Street Terminal moves the cars to the stations on the Jersey Shore, but as to physical handling of the packages *by* the Railroad Companies, there is none on carloads, until arrival at destination, if then, or until arrival at a transfer station on less than carload shipments, for the shipments are handled in cars on car floats and delivered to the Railroad Company loaded in cars, so that the Railroad Company has merely to move the car.

On the other hand, shipments of the Federal Sugar Refining Company are brought to the Railroad Companies at their stations on the New Jersey Shore on lighters and not in cars and the sugar has to be taken by the Railroad Company from the string piece of the wharf and loaded into cars to go forward to destination or transfer station.

"Floatage" in cars on floats and "Lighterage" on barges are quite distinct and different services from the physical standpoint and as to the service each requires from the railroad at the New Jersey shore.

These facts also constitute in law differentiating circumstances and conditions which the Commission was bound to give due weight and did not.

C.

The Railroad Companies are under liability with respect to shipments made by Arbuckle Brothers prior to arrival of same at the New Jersey Shore, which liability does not exist in the case of shipments of the Federal Sugar Refining Company.

Bills of lading of the carrier are issued and outstanding and cover the transportation of sugar shipped by Arbuckle Brothers at the time of its delivery at the Jay Street Terminal, while there is no railroad bill of lading issued and outstanding against the Federal Sugar Refining Company's shipments until they are delivered at Jersey City. Irrespective of any obligation of the Jay Street Terminal to indemnify the Railroad Companies against loss or damage to shipments received at Jay Street Terminal until delivery at Jersey City, the carriers are under obligation, during that period of the transportation, to the consignee or holder of the bill of lading, which does

not obtain as to the Federal Sugar Refining Company's shipments until delivery of the shipment at Jersey City. Apart from the possibility of the indemnity of the Jay Street Terminal proving insufficient as to loss or damage which is known to have actually occurred to shipments handled by it before delivery at Jersey City, there may be, of course, cases of loss or damage, the exact time and occasion of which cannot be definitely determined, although in fact, such loss or damage may have occurred while the property was in the possession of the Jay Street Terminal. In such cases the railroad has a responsibility to the consignee or holder of the bill of lading for which it cannot obtain indemnity.

This also constitutes in law a differentiating circumstance and condition.

D.

The amount paid to the Jay Street Terminal per cwt. for its services is an improper and unlawful measure of any payment to be made to the Federal Sugar Refining Company.

The contracts by which the Jay Street Terminal is employed as the public freight station of these appellees provides for a compensation for all its services on the basis of 3 cents and $4 \frac{1}{5}$ cents per one hundred pounds, according as to whether the freight is destined to or shipped from points east or west of Trunk Line Termini.

These payments are not made as a compensation solely for the service of floating the sugar shipped by Arbuckle Brothers from Jay Street Terminal to the rail terminals of these appellees. The Jay Street Terminal receives payment for such service only as an incident to the total payment for its entire service on the sugar shipped by Arbuckle

Brothers and all other shipments. It must perform the entire service under the contract to get paid for any part of it.

The undisputed testimony was that the net earnings of the Jay Street Terminal were but 3% on the amount invested with nothing for interest or depreciation (Commission's Report, Record, p. 50) which scarcely shows a profitable transaction, particularly when the large responsibility assumed by the Jay Street Terminal is considered. No contention or suggestion is made that such compensation is too large. Chairman Knapp said in the majority report of the Commission on the first complaint :

"Indeed, the only inference which can be drawn from the proof submitted is that the Jay Street Terminal does not receive a reasonable return upon the investment" (Record, p. 31).

On the other hand the Federal Sugar Refining Company, under the Commission's order, would receive 4 1/5 cents per cwt. on all the sugar shipped by it over appellees' lines to points west of Trunk Line territory, while the actual cost to it for lighterage would be but 3 cents per cwt. under its contract with the Ben Franklin Transportation Company, thus covering the entire cost of bringing the sugar down from Yonkers, and in addition giving a clear profit of 1 1/5 cents per cwt. without the employment of any capital, or the assumption of any risk or of any obligation to perform any service for others. On shipments to nearby points the Federal Sugar Refining Company would receive only 3 cents per cwt., but that would cover its full cost of lighterage on such shipments and would not affect its profit on the others.

As a matter of fact the transportation of its sugar from

within lighterage limits costs the Federal Sugar Refining Company nothing, because it has to pay the Ben Franklin Transportation Company as much for bringing its sugar down from Yonkers to lighterage limits as for the full distance to the Jersey Shore terminals, *i. e.*, 3 cents per cwt.

It is submitted that on these undisputed facts compliance with the Commission's order by payment to the Federal Sugar Refining Company would obviously not prevent discrimination, but cause it, and that the Commission is without power to make the continuance of lawful payments to the Jay Street Terminal conditional upon payments at the same rate per cwt. to the Federal Sugar Refining Company.

POINT 6.

Dissenting Opinion of Judge Mack.

Judge Mack is in accord with the majority of the Commerce Court on the proposition that the services of the Jay Street Terminal in floating the sugar of Arbuckle Brothers to the terminals of these appellees are a part of the transportation which these appellees hold themselves out to perform and are not accessorial. He further admits that the transportation by these appellees of the sugar of the Federal Company does not begin until delivery is made to them at the Jersey shore.

It would seem that the natural conclusion to be derived from these two premises is that there was no unjust discrimination in violation of Section 2 of the Act to regulate commerce, as that section has been interpreted in this

Court. For in *Wight vs. United States*, 167 U. S., 512, 518, it is said :

“ It was the purpose of the section (2) to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.”

Starting with the premise that Arbuckle Brothers ship over the lines of these appellees from Brooklyn, and the Federal Company from Jersey City, it naturally follows that Section 2 is not applicable to the situation, because the service afforded the two shippers is neither “ like and contemporaneous ” or under “ like circumstances and conditions.”

But Judge Mack proceeds to find that there is unjust discrimination in violation of Section 2, because, although the fact is that the Federal Company is a shipper from the Jersey shore, and Arbuckle Brothers from Brooklyn, that nevertheless discrimination arises from the fact that the carriers will not hire the Federal Company at the same compensation per cwt. as paid to the Jay Street Terminal, to lighter its shipments from Pier 24.

In other words, that the Federal Company would ship from Pier 24, providing these carriers sought fit to make it their agent for the purpose of lightering sugar and paid a compensation equal to that paid to the Jay Street Terminal. The discrimination in violation of Section 2 results from the refusal of the carriers to do so, according to Judge Mack.

The answer of the carriers to this proposition is that they will place the Federal Company upon an equality with Arbuckle Brothers and treat it as a shipper from Pier 24,

or any other point in lighterage limits, if it will deliver its shipments to them at that point.

But this will not cure the discrimination according to the Commission and Judge Mack, because the carriers hire the Jay Street Terminal and pay it allowances, and that therefore to place the Federal Company upon an equality with Arbuckle Brothers the same compensation must be paid it by these appellees.

This conclusion is reached by Judge Mack by assuming that "If the Federal Company had its refinery at Pier 24, and if Arbuckle Brothers operated their wharf only as a private and not as a public station, and if the allowance made to them for carrying their sugar to Jersey City were no more than the bare cost of the service, the Commission would be justified in finding that a refusal to make a similar allowance to the Federal Company and the offer to give it in lieu thereof free lighterage of its sugar would result in an unjust discrimination against the Federal Company (Union Pacific Railroad Company vs. Updike Grain Company, 222 U. S., 215.)" (Record, p. 120).

He then proceeds to cast aside as matters of no consequence the fact that the refinery of the Federal Company is located not at Pier 24 but at Yonkers on the ground that it can make no difference to the carriers how the sugar gets to Pier 24 as long as it gets there, and the further fact that the Jay Street Terminal is not operated as a private wharf of Arbuckle Brothers, but as the public station of these appellees.

It is submitted in the first place that even if the plant of the Jay Street Terminal were the private wharf of Arbuckle Brothers, it would not be an unjust discrimination to pay them for performing a transportation service the bare cost thereof, and to refuse to pay the same amount

to the Federal Company for lightering its sugar from Pier 24, providing reasonable lighterage facilities were accorded the Federal Company by these carriers. The Act to Regulate Commerce does not require of the carrier that it shall not hire one shipper to perform a transportation service in connection with his shipments, unless it hires all other shippers at the same price to perform services in connection with their shipments. The Updike case is not an authority for such a proposition. That case holds that the carrier cannot make an agreement with all shippers to perform transportation services in connection with their shipments and then refuse to pay some of them for the services so performed, by requiring compliance with an arbitrary and unreasonable rule. That is quite different from saying that the carrier may not make an agreement with one shipper to perform certain services and refuse to make the same agreement with other shippers, but in lieu thereof grant the same facilities at its own cost, providing the arrangement does not result in the payment of more than the bare cost of the service to the shipper with whom the agreement is made. It was said by the Commission in the proceeding entitled "In the matter of allowances to elevators by the Union Pacific R. R. Co., 12 I. C. C., 85, at p. 89": "It must be understood, however, that if such elevation is furnished by the Union Pacific Railroad Company for the grain of one shipper over its lines, proper arrangements must be made by it for furnishing elevation to other shippers over its lines; for otherwise the company would subject itself to the charge of practicing an unjust and unlawful discrimination against other shippers who for any reason cannot use the Peavey Elevators."

If the Union Pacific had not extended the arrangement it had made with the Peavey elevators to all other eleva-

tors, but had granted the same service of elevation as was accorded on the grain of Peavey & Company, by supplying adequate and convenient elevators of its own for the performance of that service for all other shippers of grain, it is submitted that the question of discrimination would not have arisen. The Union Pacific, however, instead of supplying the facilities itself, preferred to extend its agreement made with Peavey & Company to all other elevators. It tried to avoid the payment for a portion of the services so rendered by the other elevators by the requirement that all cars should be returned to it within forty-eight hours or the allowances would not be paid. It was impossible for the other elevators not located on the rails of the Union Pacific to return foreign line cars to the Union Pacific because of the rules of the American Railway Association, of which the Union Pacific was a member. It is said by this Court in the Updike case on page 219 :

“ The Union Pacific’s desire to have cars promptly unloaded so that they might be returned to its own line may have been the principal motive which induced it to pay elevator charges. But the consideration, moving between the carrier and the elevator, was the service performed by the latter in unloading grain at terminal points. This relieved the carrier of the expense of building similar structures and avoided the delay of having the grain transferred from one car to another by the slow process of shovelling. When the service was rendered the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose.”

The point is that the Union Pacific, after agreeing to pay for the performance of certain services, could not avoid making compensation therefor by the enactment of an

arbitrary and unreasonable regulation. This is quite different from saying that an unjust discrimination results from the action of a carrier in hiring one shipper at cost and performing the same service for another shipper itself.

Could the Commission properly require these appellees to pay to the Federal Sugar Company the same allowance as they paid to Arbuckle Brothers for floating their sugar from the Jay Street Terminal, assuming that to be the private wharf of Arbuckle Brothers? Obviously not if the cost of floatage from Jay Street Terminal, were in excess of the cost of lightering from Pier 24. Would not it be an unjust discrimination for these appellees to pay one shipper the bare cost of performing a transportation service and pay a sum which would accord a splendid profit to another shipper for the performance of a service. As has been previously pointed out the lighterage of sugar from Pier 24 by the Federal Sugar Company is not the same service as that performed in floating sugar from Jay Street Terminal. In the first place, it costs the carriers more to handle this lightered sugar than it does sugar loaded into cars by the shipper and delivered to the carrier on car floats. Then again it naturally would cost the Federal Company much less to perform the service of lightering sugar from Pier 24 than it does the Jay Street Terminal to float sugar from that Terminal in Brooklyn, the distance being much further. As a matter of fact, it costs the Federal Sugar Company nothing for lighterage from Pier 24 because that service is, in a sense, "thrown in" by the Ben Franklin Transportation Co. without extra charge above its charge for bringing the sugar down from Yonkers. To pay them the same allowance even if they both be considered as private shippers would result in a preference of the Federal Company.

This brings us to a consideration of the proposition of Judge Mack's that in as much as railroads are not concerned with the history of goods offered to them for transportation, that therefore the Federal Company are shippers of sugar from Pier 24 when the lighter of the Ben Franklin Transportation Company ties up at that pier, and and that therefore their situation is parallel to that of Arbuckle Brothers.

We agree that the railroads have no concern with the past history of the goods offered to them for transportation and it is submitted that if the sugar of the Federal Company were offered to these appellees at Pier 24, for transportation, no questions would be asked as to its origin, but it would be granted free lighterage. But when the Federal Company refuses to offer its sugar to these appellees at any point except at their Jersey terminals, unless these carriers hire it as their agent at a certain compensation to transport the sugar from Pier 24, we submit that the origin of this sugar becomes an important consideration, for the simple reason that the Federal Company is asking to be compensated not for transportation from Pier 24 to the Jersey shore, but from the origin of the sugar, namely, Yonkers. "If the refinery were situated in New York City, a few blocks, off the water front on a small canal or creek large enough only for rowboats," * * * (Record 122) as Judge Mack presupposes, we might not be interested in how the sugar got to Pier 24, if offered at that point to the railroads for transportation, but if the refinery should refuse to deliver it there but insist upon rowing the sugar across the river to New Jersey in the original rowboats and delivering it at that point to the railroads and demanding compensation for the entire expense it was put to in carrying the sugar from the refinery to the railroads, it

becomes apparent that the railroads must be interested in the entire movement, and that the Commission and the Courts should give consideration to the history of the entire transaction.

Judge Mack agrees with the proposition contended for by these appellees, namely, that if the Federal Company is a shipper from Yonkers and not from Pier 24, that the case should be decided against the contention of the appellants (Record, p. 121). We have discussed this question under Point I of this brief and have pointed out that the shipments of the Federal Company start from Yonkers under one contract of transportation with the Ben Franklin Transportation Company at the rate of three cents per cwt. for delivery to the terminals of the appellees on the Jersey shore. There is no distinction in this case from the one considered by the Commission on the first complaint of the Federal Company, except the device of having the lighter stop on its trip from Yonkers to the Jersey shore at Pier 24. Can this stop of the lighter so change the situation of the parties, that an unjust discrimination now must necessarily appear where none existed before?

Judge Mack explains the necessary appearance of this unjust discrimination by the pointing out that the original complaint was based upon Section 3 of the Act to Regulate Commerce, while the present one is based upon a violation of Section 2 (Record, p. 122). As a matter of fact, the original complaint alleged that the same sections of the Act were violated as does the present one. So it would seem that this explanation is hardly sufficient to account for the change of opinion on the part of the Commission.

If, as stated by Judge Mack, "The refinery at Yonkers would, of course, always be under the disadvantage of having to bring its goods to Pier 24" (Record, p. 122) and

it appears that this cost is the same as from Yonkers to the Jersey shore, must it not be apparent that the situation has not been altered by the stop of the lighter at Pier 24? If the situation has been altered and the Federal Company is now to be treated as a shipper from Pier 24 why did not the Commission determine the reasonable amount to be paid that company for lightering sugar from Pier 24, instead of ordering these appellees to pay it allowances in excess of the cost of lightering the sugar from Yonkers? Judge Mack's answer to this is found in his last proposition.

He concludes that the employment of the Jay Street Terminal as a union station and the fact that the compensation paid that Terminal is for all the services performed by it in connection with shipments of all kinds of commodities, does not necessarily render the circumstances surrounding the transportation of the sugar to Jersey City so dissimilar from those at Pier 24 as to justify the Court in holding that the Commission could not reasonably find that an unjust discrimination resulted from the payment to Arbuckle Brothers and the refusal to make a similar payment to the Federal Company. It is submitted that there was absolutely no evidence in the record by which the Commission could reach such a conclusion. Speaking of the weight to be given the findings of the Commission, this Court said in *Interstate Commerce Commission vs. Union Pacific R. R.*, 222 U. S., 541, at pp. 547 and 8:

"Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere *scintilla of proof*, but the courts will not examine the facts further than to deter-

mine whether there was *substantial evidence to sustain the order*" (the italics are ours).

It stands admitted that the amounts paid the Jay Street Terminal barely return the cost of actual operation of the varied business it binds itself to do, no allowance being made for interest or depreciation, that it costs the Federal Company but three cents per cwt. to bring its sugar from Yonkers to the terminals of these appellees and it incurs no obligation as to other business whatever. Upon such admitted facts, how could it be possible for the Commission to properly say the situation is the same, and unless you give the Federal Company 3 cents and $4 \frac{1}{5}$ cents per cwt. you are guilty of unjust discrimination in favor of Arbuckle Brothers. The proposition is so absurd that an attempt is made to give it strength by references to the Commission's investigations relative to allowances paid Havemeyer & Elder, and its understanding that similar allowances were paid Arbuckle Brothers (Record, pp. 48, 49 and 50). These matters are not of record in this case, and any inferences harmful to the good faith of the Jay Street Terminal contracts are fully met by the fact that all of the union terminals on New York Harbor are paid the same rates though they have no connections with shippers.

POINT 7.

The Commission's order is beyond its power, and is based on mistakes and misconceptions of law. We are not attempting to review the wisdom of Congress in conferring upon the Commission the powers which have been lodged in that body, or to substitute the judgment of the Court for the judgment of the Commission on matters within its proper discretion on facts properly found; neither do we attack, or invoke the exercise of unwarranted judicial powers to review, the wisdom or expediency of the Commission's action in the proper performance of the administrative functions vested in it. But a thing that as a matter of law is not true, cannot be said to be true as a matter of fact.

The Commission is a body of broad and varied powers, but mostly administrative in their character, and its powers and duties go hand in hand. In determining and prescribing *in a proper case*, just and reasonable charges and regulations for the future, it exercises a legislative function; but most of its functions, including the performance of its duty to inquire into alleged violations of law, and, when they exist, to put an end to them, and to enforce the prohibitions of the law, are in no sense legislative, but are purely administrative.

It is its duty to consider complaints as to violations of the law, and to enforce the law. It has no power to perpetuate either conditionally or unconditionally, that which is prohibited and declared by the statute to be un-

lawful. To do this is beyond the lawful scope of its orders. Any such violation of the act is made a misdemeanor, punishable by heavy fines, and, in case of an unlawful discrimination in charges, or of rebating, the offender is also liable to imprisonment (Sec. 10).

It may order the offenders "to cease and desist" (Sec. 15) from any such violation, and for failure or refusal to comply with its lawful orders, heavy penalties are imposed; and it may enforce its orders through the Commerce Court (Sec. 16).

It must (Sec. 12) execute and enforce the provisions of the Act, and may call on the Department of Justice to prosecute proceedings for their enforcement and for the punishment of all violations thereof.

The Federal Company filed its complaint with the Commission, under Sec. 13 of the Act, charging the railroad companies with exaction of "unjust and unreasonable rates," with "unjust discrimination," and with subjecting it to "undue and unreasonable prejudice," in violation of Sections 1, 2 and 3, respectively, and praying for relief including (Record, p. 39) damages to the amount of several thousand dollars by way of reparation as per schedule annexed to the complaint, which damages were awarded by the Report (Record, p. 60).

The carriers answered the complaint, and hearing thereon followed, as provided in Sec. 13. Sec. 14 requires the Commission in such case to "make a report in writing in respect thereto, which *shall state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award was made.*"

The report in this case would seem to award damages.

It provides (Record, p. 60): "Upon filing of a detailed statement, properly checked by the defendants, *a further order* will be entered, allowing reparation to complainant, in accordance with the prayer of its petition." The Report did not include findings of fact which comply with such requirement of Section 14.

By Sec. 16 such findings of fact are made *prima facie* evidence of the facts stated therein in certain cases.

Interstate Commerce Commission vs. Union Pacific R. R. Co. et al. (222 U. S., pp. 541, 546 and 547).

Whatever other conclusions and findings the Report must contain to comply with the statute and afford a lawful basis for a proper order, it must at least contain conclusions clearly showing the specific provision or provisions of law, if any, which the carriers are found to have violated, the respects in which they have been violated and the acts or things which are held to constitute such violation.

The Report in this case does not comply with these requirements and it and the order based thereon are defective and void.

Texas & Pacific Ry. vs. I. C. C., 162 U. S., 197, 239.

I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep., 409, 414, 415 (Circuit Ct. M. D. Tennessee, 1896, Clark, Dist. Judge).

Section 15 provides that when "after full hearing upon a complaint" the Commission "shall be of opinion" that any charges, practices, etc., of the carriers are "unjust or unreasonable" [under Sec. 1], or "unjustly discriminatory" [under Sec. 2], or "unduly preferential or prejudi-

cial" [under Sec. 3] or otherwise in violation of any of the provisions of the act, the Commission is empowered to prescribe what practice, etc., is "*just, fair and reasonable, to be thereafter followed, and to make an order that the carrier shall cease and desist from such violation* to the extent to which the Commission finds the same to exist."

The Commission is not empowered by the act or otherwise to make an order providing for the continuation of a violation of law provided the carrier also violate it in favor of another party—as does the order complained of, if, as contended, the payment to Jay Street Terminal is accessory and illegal.

The report states no conclusions which would support an order based on a supposed violation of Section 2.

By that section the charging or receiving from any person a greater or less compensation for any service rendered in the transportation of property, subject to the provisions of the act, than it charges or receives from any other person for doing him (a) a like and contemporaneous service, (b) in the transportation of a like kind of traffic, (c) under substantially similar circumstances and conditions is defined as being "unjust discrimination" and prohibited, and declared to be unlawful.

The appellants seeking to sustain the order as being based on "unjust discrimination" in violation of Section 2, appreciate that Section 2 has no application unless it is found, and properly found, that the railroad transportation service on both the Arbuckle Brothers' shipments and the Federal Company shipments began only at the Jersey City, Hoboken and Weehawken Stations of the respective companies in New Jersey, and that all the services performed by Jay Street Terminal in New York and in float-

ing the shipments to such New Jersey stations were accessory services and not part of the transportation service.

There are, of course, many things which may, in a general sense, be discrimination, and some of these may violate other provisions of the act without constituting the "unjust discrimination" defined in Section 2. It is to be presumed that the former are what the Commission had in mind in much of the general discussion in the Report.

The Commission's report contains no conclusions showing a violation of Sec. 2, and, as has been shown, if it did, such conclusions would be erroneous as a matter of law (See *Report of Commission, Record*, pp. 52 to 55, 58, 59).

If, as contended, the railroad transportation of Ar-buckle Brothers, shipments begins in New Jersey, then the large volume of such shipments consigned to points in the State of New Jersey are *intrastate* and not *interstate* shipments, and are without the jurisdiction of the Commission, notwithstanding that the railroad companies' bills of lading have been issued showing shipment from New York, and notwithstanding the other facts in the case. In such case the order is erroneous, because it undertakes to prohibit payment for handling any shipments of Ar-buckle Brothers, without excepting such *intrastate* shipments to points in New Jersey, unless like payments are made to the Federal Company; and it is also erroneous because it requires as such alternative the payment of such amounts to the Federal Company on all of its shipments, including those consigned to points in New Jersey, which are concededly *intrastate*.

The order clearly cannot be sustained as properly based upon "unjust discrimination" in violation of Section 2.

The order cannot be sustained as being properly based on a violation of Section 2.

There can be no violation of Sec. 3, unless the carriers have given Arbuckle Brothers an undue or unreasonable preference or advantage, thereby subjecting the Federal Company to undue or unreasonable prejudice or disadvantages.

As counsel for the United States had not filed their brief in this Court, when this brief went to print, we refer to their argument on the former appeal, and also to their contentions in the Court below.

Counsel for the Government did not attempt to argue in this Court on the former appeal that the order of the Commission can be sustained upon the theory that there was a violation of Sec. 3, forbidding undue or unreasonable preferences or advantages, or that the conclusions of the Commission were based on that theory.

The Government rested the case on its former argument in this Court (and also in the Commerce Court), so far as the claims of violation of law which were before the Commission are concerned, entirely on the contention that the Arbuckle Brothers' shipments, as well as those of the Federal Company, were delivered to the railroad companies at their New Jersey station, and not elsewhere (Government's Brief, former appeal, p. 10); "that the transportation by the railroad companies begins at the Jersey shores (Brief, p. 18); that the service performed by Jay Street Terminal was not a transportation service, and the payment therefor was an unlawful allowance," and that "In simple truth the parties forgot to tuck in the ears of the *rebate* when they put over it the sham cover of transportation service" (Brief, p. 18); and that the Commission determined that this was "a discrimination against the Federal Company and in favor of Arbuckle Brothers" (Brief, p. 6).

On the argument in the Commerce Court, Mr. Dennison, Asst. Attorney-General, was very positive in stating this contention of the Government. He said in answer to a question of Judge Knapp (Minutes, p. 8): "I say it was competent for the Commission to decide, reasonable for them to decide on the facts before them that the rail transportation began at Jersey City. *If the transportation began at the Jay Street Terminal, then there is nothing left of the order.*" He further said (on pp. 22 and 23): "It seems to me, *it must be true that the transportation begins at Jersey City, and if that be so, the alternative portion of the order is invalid.* I cannot see that there is any answer suggested to the Court on that proposition, but it does seem perfectly clear that the Commission did find that the transportation begins at Jersey City."

The Commission and the Federal Sugar Company on the former argument rested their case upon this same contention of the Government, and in their briefs on this appeal they in part rely upon this contention (Commission's Brief, p. 3, Fed. Sugar Co. Brief, pp. 7, 12, 14). The Commission on this appeal, however, does not specifically urge as it did before that it found the action of these appellees, in refusing to make the same allowances on the shipments of the Federal Sugar Company as they did on the Arbuckle Brothers' shipments, an unjust discrimination in violation of Section 2. It has preferred in its present brief, as it did in its opinion, to refrain from pointing out the specific sections of the Act to Regulate Commerce which it found to be violated, and argues generally that there is undue discrimination, because these appellees have not placed the Federal Sugar Company upon an equality with Arbuckle Brothers in the transportation of sugar over their respective lines of railroad.

The Federal Sugar Company relies in the main upon the proposition that the services performed by the Jay Street Terminal are accessory and that therefore Section 2 has been violated, but it also takes the alternative that if such services are transportation services and not accessory, that then there is unjust discrimination and undue preference, because the Federal Company furnishes precisely the same facilities and performs the same service in the transportation of sugar as does the Jay Street Terminal.

Disadvantages to which the Federal Company is subjected by reason of its location at Yonkers as well as all disadvantages it is subjected to other than by these appellees cannot be brought under Section 3, any more than could the advantage the Federal Company secures over its New York City competitors through its Yonkers location on the tracks of the New York Central, its cheap waterfront, etc., be complained of by Arbuckle Brothers, or other New York refiners as undue advantages given the Federal Company by the New York Central Company.

It is not even every disadvantage to which a person may be subjected by a carrier that would offend the act; but only such as might properly be found to be undue or unreasonable.

To make out "undue prejudice" in this case, it must first be established

(a) that the Federal Company shipments from Yonkers are no longer *interstate* shipments to New Jersey, but that there is now, first, an independent *intrastate* shipment to and delivery at Pier 24, and then a second shipment originating at Pier 24, and

(b) that the carriers are giving Arbuckle Brothers such undue preference with respect to their shipments from

Jay Street Terminal that it would subject the Federal Company to undue prejudice if it were not given the privilege of lighterage, by itself or by its agents, its own shipments and receiving an allowance from the carriers therefor.

Whether these shipments were shipments originating at Pier 24, within New York lighterage limits has been conceded by counsel for the Commission on the prior argument in this Court to be a question of law.

The Commission clearly erred in holding that they did originate there, and the order based on that conclusion is void.

But even if there had been a delivery to the Federal Company at Pier 24 and a new shipment originating there, the only respect in which it is even suggested that the railroad companies have given Arbuckle Brothers a preference or advantage is that such companies, in common with numerous other carriers, have employed Arbuckle and Jamison (comprising the firm of "Jay Street Terminal" as well as the firm of "Arbuckle Brothers") to provide a union terminal station and certain instrumentalities used in transportation, and to render certain services connected with the transportation of the traffic handled through such Terminal Station, including the floatage, or, in some cases, the lighterage of the traffic from such Terminal Station to the rail stations of the respective companies at Jersey City and other points on the New Jersey shore.

No claim is made that the Federal Company is subjected to any disadvantage because the carriers by themselves or through terminal companies other than Jay Street Terminal receive and transport to the New Jersey rail terminals traffic originating in New York City, including the traffic of competitors of the Federal Company;

and it appears that the compensation paid alike to the Jay Street Terminal and to such other terminal companies is no more than is just and reasonable for the services so rendered and the use of the instrumentalities so furnished.

It follows that the charge of undue preference is based solely upon the fact that a part of the traffic handled through Jay Street Terminal is shipped by Arbuckle Brothers, whose members compose the terminal company. The title to over 80 per cent. of these Arbuckle Brothers' shipments passes to the consignees on delivery to the railroad company at the Jay Street Terminal, and title to the remainder, for which railroad order bills of lading are forthwith issued, may or may not remain in Arbuckle Brothers while they are being hauled by the Terminal Company.

Unless the mere fact that the carriers have so employed Jay Street Terminal for no more than a just and reasonable compensation, constitutes an undue preference to Arbuckle Brothers and subjects the Federal Company to undue or unreasonable disadvantage, they are not subjected to any. It is true that with respect to their shipments via these appellees' lines, lightered from Yonkers, they are at a natural disadvantage, as it costs them 3 cents per hundred pounds for lighterage to the New Jersey terminals or to any point in New York City where the carriers have stations or receive freight, except that in case of shipments *delivered* at Pier 24, the cost is 4 cents; but these Railroad Companies are not responsible for this disadvantage, and no one can properly contend that they should be required to bear the burden or expense of bringing such shipments from Yonkers to the carriers' terminals, although the order complained of would erroneously, by indirection, accomplish that result.

The Federal Company points out no alleged prejudice beyond the fact of the employment above stated. On the contrary, its counsel deliberately stated to the Commission that his client would be in no respect benefited if the operation of that terminal were to pass into the hands of a third party or were to be taken over by the railroad companies themselves (Record, pp. 60, 64). This would seem to conclusively show that neither the employment of Jay Street Terminal nor the relations of Arbuckle Brothers to the traffic handled through the terminal subjects the Federal Company to any undue or unreasonable prejudice or disadvantage.

In its final analysis the real fact is that the only disadvantage the Federal Company is under so far as its relation to these carriers is concerned, arises from its location at Yonkers, and it has been for years, and is now, endeavoring to overcome that disadvantage by inducing or compelling the railroad companies to perform lighterage service to Yonkers or assume at least the cost thereof.

The allowance provided in the order is not the proper or legal measure of relief which could be awarded even if a case of violation of Section 3 had been established.

In a case arising under Section 3, the Commission cannot by its order go further than to equalize the undue advantage and thereby relieve the undue prejudice.

We are unable to perceive that there is any undue disadvantage for the removal of which a money allowance is proper or lawful, but it would seem in any event that on no tenable theory could any such allowance properly exceed such part of 3 cents per hundred pounds as fairly represents what it pays the Ben Franklin Company for performing lighterage service across the river between Pier 24 and the

New Jersey stations. In no sense is the just and reasonable compensation paid to Jay Street Terminal and other terminal companies for much greater, more costly and more valuable service a proper or legal measure of what would equalize any advantage which the respondents contend the carriers have given to Arbuckle Brothers.

The Jay Street Terminal and the other terminal companies furnish, severally, terminals and other instrumentalities used in transportation worth million of dollars, as against the wandering lighter of the Ben Franklin Company, representing an investment of a few thousand dollars.

The present order requires as one alternative the payment to the Federal Company of allowances that would much more than pay the entire cost of transporting their traffic from Yonkers to the New York or New Jersey terminals of the carriers and give them an unjust advantage over New York shippers. The Commission has no power to require or even to permit any such practice or allowance.

POINT 8.

The order of the Commission is repugnant to the Constitution of the United States. It deprives these appellees of their property without due process of law.

The order of the Commission requires these appellees to either pay the Federal Sugar Refining Company for bringing its sugar from Yonkers to their terminals on the Jersey shore or else desist from paying allowances to the Jay Street

Terminal for the services performed by that Terminal Company under its contracts with these appellees in connection with the shipments of sugar made by the Arbuckle Brothers over the lines of these appellees through the station maintained and operated for them by the Jay Street Terminal. In other words these Railroad Companies are required to pay the Federal Sugar Refining Company for services that are strictly accessorial and which they are under no legal duty to perform or as an alternative to discontinue payments to the Jay Street Terminal on account of the sugar shipped by Arbuckle Brothers. If the Railroad Companies adopt this alternative it will cause them to break the contracts which they have entered into with the Jay Street Terminal, with their consequent exposure to the cancellation of their contracts by the Jay Street Terminal, the loss of the use of its station and terminal facilities, the necessity of supplying others, and to claims for damages for violation of such contracts. To deprive these appellees of the benefits of these lawful contracts with the Jay Street Terminal is clearly a taking of their property without due process of law.

The only escape from this serious loss, permitted the Railroad Companies by the order of the Commission is that they compensate the Federal Sugar Refining Company for services which the law requires the shipper to perform for himself. In other words, if these appellees desire to continue to enjoy the privileges inuring to them from the lawful contracts they have made with the Jay Street Terminal, they must be mulcted to the extent necessary to overcome the physical disadvantages of the Federal Sugar Refining Company's location at Yonkers. When an order of the Interstate Commerce Commission requires these appellees to pay for services which it is no part of their legal duty to perform, it certainly deprives them of their property without due process of law.

POINT 9.**Commodities Clause.**

The appellants in their Eleventh assignment of errors (Rec., p. 127) assert that the Commerce Court erred in not holding that the railroad companies petitioners and the intervening petitioner "are not in court with clean hands, and have no standing in a court of equity, for in the operation of the Jay Street Terminal they are unlawfully transporting in interstate commerce sugar manufactured, produced, and otherwise dealt in by them, and in which they have an interest, direct and indirect, in violation of Section One of the Act to Regulate Commerce."

The so-called "Commodities Clause" makes it unlawful for any *railroad company* to transport in interstate commerce commodities other than timber, etc., manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles as may be necessary and intended for its use in the conduct of its business as a *common carrier*.

The Commodities Clause has no application to this case, and no suggestion that it was violated was before the Commission or considered by it or made the basis of its conclusion or order.

No contention has heretofore been made by the Commission or the Federal Sugar Refining Company, either in the proceedings before the Commission or before the Commerce Court or on the former appeal to this Court that the railroad companies, appellees, and Jay Street Terminal

are violating the Commodities Clause, or that the order of the Commission involved in this case could or should be sustained on the theory of any such violation of the Commodities Clause.

The only reference heretofore made by counsel for the United States to this clause was in connection with the assertion contained in the Government's brief upon the former argument in this Court (Brief, pp. 11, 16, 18, which brief was also filed on the recent hearing in the Commerce Court) that the adoption by the railroad companies of the Jay Street Terminal as a terminal station, so far as concerned the shipments of Arbuckle Brothers, "was against public policy and public law." In that connection he argued that "Lead us not into temptation" had been embodied in the Interstate Commerce Act as a rule of practical morality, quoting the "Commodities Clause" and stating that "in this case the ownership of sugar shipped by Arbuckle Brothers is direct, and their interest in it is immediate and absolute."

Not only are Arbuckle and Jamison and the Jay Street Terminal not a railroad company, but they are not even a *common carrier*. They lack many of the incidents essential to either status. The Commission's order is, of course, inconsistent with any finding that the arrangement with Jay Street Terminal involves any violation of the Commodities Clause, for it authorizes the continuance of the arrangement provided only that a similar one be entered into with the Federal Sugar Refining Company. As has heretofore been shown, the sole power and duty of the Commission in case it ascertains that a provision of law which it is charged with the duty of administering is being violated, is to require the guilty

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party to cease and desist from the violation thereof, or to take other steps to prevent such continued violation. It has no power to direct or authorize the continuance of such violation on condition that the guilty party shall extend its illegal arrangements to a third party. As well stated by the Commerce Court in another connection (Rec., p. 117), we must indulge the presumption that the Commission did not find that the arrangement with Jay Street Terminal was in violation of the Commodities Clause or it would not have framed its order in the alternative.

POINT 10.

The decree of the Commerce Court should be affirmed.

GEORGE F. BROWNELL,
H. A. TAYLOR,

Solicitors for Railroad
Companies, Appellees.

MAPS

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LARGE

FOR

FILMING

U. S. DISTRICT COURT, U. S.
BOSTON.

JAN 14 1913

JAMES H. MCKENNEY,

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, THE FEDERAL SUGAR
REFINING COMPANY and INTERSTATE
COMMERCE COMMISSION,

Appellants.
against

NO. 285
No. 862.

BALTIMORE AND OHIO RAILROAD COMPANY
AND OTHERS, and JAY STREET TERMINAL
and ARBUCKLE BROTHERS,

Appellees.

BRIEF FOR JAY STREET TERMINAL AND ARBUCKLE
BROTHERS, APPELLEES.

WILLIAM N. DYKMAN,

Solicitor for Intervenors,

177 MONTAGUE STREET,

Brooklyn, N. Y.

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To be argued by

MR. WILLIAM N. DYKMAN, for
Arbuckle Brothers and Jay
Street Terminal.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, THE INTER-
STATE COMMERCE COMMISSION and
FEDERAL SUGAR REFINING COM-
PANY,

Appellants,

AGAINST

No. 862.

THE BALTIMORE AND OHIO RAILROAD
COMPANY and others, ARBUCKLE
BROTHERS and JAY STREET TER-
MINAL,

Appellees.

**BRIEF FOR JAY STREET TERMINAL AND
ARBUCKLE BROTHERS, APPELLEES.**

The appeal is from a final decree of the Commerce Court (p. 123) suspending an order of the Interstate Commerce Commission (p. 66) requiring the railroads to cease paying "allowances to Arbuckle Brothers on their sugar while at the same time paying no such allowances to complainant (Federal Company) on its sugar."

Jay Street Terminal owns and operates, as the agent of the seven trunk line appellees and as their public union freight terminal an extensive water front in Brooklyn, together with a railroad yard, storage tracks, freight house, platforms, piers, float bridges, tug boats, car floats, and the usual appurtenances for receiving, handling and transporting freight by water. The payments by the railroads referred to in the order are made to this firm under contracts the type of which (p. 15) was made with the Erie Railroad Company in 1906.

Arbuckle Brothers are refiners and dealers in sugar with their office in the borough of Manhattan and refinery in Brooklyn, a block away from the Jay Street Terminal. No payments for moving sugar are made to this firm by the railroads.

Both Jay Street Terminal and Arbuckle Brothers are partnerships with the same partners but their properties, business and organizations are wholly separated except that sugar refined by the one is received and handled by the other for the railroad companies.

"Federal Sugar Refining Company of Yonkers" with its office and refinery in Yonkers complained in 1907 to Interstate Commerce Commission of the seven trunk line railroads appellees that payments to Jay Street Terminal for certain instrumentalities and services and their refusal to complainant operated as a discrimination and preference and prayed relief that the Commission fix the reasonable compensation to be made to complainant for lightering its sugar from Yonkers to the railroads and order it paid. The Commission denied the petition. The Federal Sugar Refining Company was then formed and petitioned the Commission to order the railroads to pay it for moving its sugar in lighters from Pier 24, North River, the same compensation as was paid Jay Street Terminal.

Neither Arbuckle Brothers nor Jay Street Terminal were made parties to either proceeding before the Commission. The Commission granted the prayer of the second petition. The

order recited that the railroad companies defendants paid allowances to Arbuckle Brothers "on their sugar brought by them on floats from (*sic*) lighters to the regular terminals of defendants on the Jersey shore in the State of New Jersey, while at the same time paying no such allowances to complainant on its sugar brought by it on lighters to the defendant's said regular terminals"; and that such allowances "unduly discriminate against said complainants and unduly preferred said Arbuckle Brothers." The order of the Commission required the carriers "to cease and desist, on or before the 15th day of April, 1911, and for a period of not less than two years thereafter, abstain from paying such allowance to Arbuckle Brothers on their sugar, while at the same time paying no such allowances to said complainant on its sugar" (Rec., p. 66). The Commission made no distinction between Arbuckle Brothers who refined the sugar and Jay Street Terminal who carried it (Fed. Sugar R. Co. vs. B. & O. R. Co., 20 I. C. C., 200).

The railroads petitioned the Commerce Court to suspend the order. Arbuckle Brothers and Jay Street Terminal intervened and then for the first time had a day in Court, the drastic order against them having been made without hearing them. The Commerce Court granted a temporary injunction.

The case was in this Court during the October term, 1911, upon the appeal of these same appellants, from the order temporarily enjoining and suspending the order of the Commission. U. S. vs. B. & O., 225 U. S., 306.

Upon their return to the Commerce Court the appellants withdrew their answers and moved to dismiss the several petitions of the railroad companies and the intervenors and submitted the case for final judgment upon these motions to dismiss. In the words of Judge CARLAND (Rec., p. 107) :

"The parties by their counsel appeared in open Court and stipulated that the case be submitted to the

Court for final decision, upon the merits, on the petitions and motions to dismiss."

The Commerce Court gave judgment for the railroads and intervenors permanently suspending the order of the Commission.

The United States, The Interstate Commerce Commission and the Federal Sugar Refining Company, appeal from the final decree.

The facts stated in the several petitions by the Railroad Companies and by the intervening complainants are upon this motion and appeal accepted as true. They are conceded by the motion to dismiss which is in the nature of a general demurrer.

The petitions allege that the freight terminals of all the defendants are upon the New Jersey shore of New York Harbor, except that of the Baltimore & Ohio R. R. Co., which is upon the Staten Island shore, and that

"In order to reach the shipping territory of Greater New York across the Hudson and East Rivers, and other waters, your petitioners have been compelled to serve the vast shipping interests of Greater New York City by means of floats, lighters and barges" (Rec., p. 21).

The railroads have no franchise to enter the Borough of Manhattan or the Borough of Brooklyn in the City of New York. They were under no compulsion of law to serve either locality and had no power of eminent domain. Their service in its inception was purely voluntary. In and by their tariff schedules filed with the Interstate Commerce Commission the railroads offer to deliver and accept east and westbound freight for the flat New York rates (Rec., pp. 3, 4, 5) within certain limits called the free lighterage limits, set forth in their petition and thereby became common carriers to and

from Brooklyn and all territory reached by them. The petition further alleges :

" Within said lighterage limits your petitioners perform without additional charge a lighterage service on eastbound shipments from their terminals upon the western shore of New York Harbor to points within those limits, and on westbound shipments from points within those limits to their rail terminals upon the western shore of New York Harbor.

" Within said lighterage limits and at various points within the boroughs of Manhattan and Brooklyn, City of New York, each of your petitioners has established, and for several years has maintained and still maintains freight terminal stations, at which it delivers eastbound freight and receives westbound freight for transportation over its lines. Each of your petitioners has some freight terminal stations as aforesaid which it owns and directly operates and others which are operated for it under and pursuant to the provisions of certain contracts between it and the owners of said terminal stations. In some instances single terminal station is operated for and on behalf of two or more of your petitioners under and pursuant to several contracts between them and the owner of said station ; and in such instances said terminal station is a union terminal for two or more of your petitioners.

" It is impossible for your petitioners to deliver and receive all freight, especially carload freight at said terminals. A large part of it must of necessity be delivered and received at public and private docks within the said lighterage limits. Accordingly your petitioners have for several years received and delivered freight at all steamship piers, docks, or landings, and private piers or landings when shippers or consignees arranged for the receipt or delivery of freight, within the lighterage limits and have lightered it without additional charge from and to said points, and still do so receive, deliver and lighter it.

" Your petitioners transport, between said terminal

stations, piers, docks and landings and their rail terminals on the western shore of New York Harbor, as a part of the transportation service from the points of shipment to the point of destination, and for the flat New York rate, by means of lighters, floats, and barges, owned and directly operated by them or operated by them under contracts between them and the owners of such equipment, freight received at or destined to said terminal stations, piers, docks and landings. Your petitioners for several years past have held and now hold themselves out as common carriers to and from all said points within the lighterage limits, both by their practice of receiving and delivering freight at said points and by their tariffs, which are now and for several years past have been duly published and filed with the Interstate Commerce Commission. The liability under their respective bills of lading attaches to your petitioners on westbound shipments from the time freight is received at such terminal station, dock, pier or landing and ends on eastbound shipments when delivered into the hands of a consignee at such terminal station, pier, dock or landing. The bill of lading issued by your petitioners for freight so received or delivered by them by its terms covers and includes the lighterage movement.

"4. Among other terminal freight stations established by your petitioners within the said lighterage limits is the Jay Street Terminal.

"The Jay Street Terminal is located at the foot of Bridge Street, Brooklyn, on the East River, having a water frontage of 1,200 feet and a depth of 600 feet. Its equipment consists of a large freighthouse, two Baldwin locomotives, three tugboats, two steam, lighters, eleven barges and nine car floats. The capacity of the yard is 235 cars.

"The Jay Street Terminal is a union freight terminal for all your petitioners and is designated as a regular public freight terminal of your petitioners in their tariffs duly filed with the Interstate Commerce Commission. It is owned by a copartnership composed

of William A. Jamison and John Arbuckle, conducting such freight terminal as a separate business under the name and style of Jay Street Terminal, under certificate filed with the clerk of New York County in accordance with the law of the State of New York, and is operated as a freight station for your petitioners under and pursuant to several contracts between your petitioners and the Jay Street Terminal, which contracts are substantially identical in their terms and provisions; a copy of one of these contracts, being representative of them all, is hereto attached and marked Exhibit 'A.'

"Under and pursuant to said contracts the Jay Street Terminal acts as the agent of your petitioners in the receipt, handling and delivery of freight at said terminal and the transportation thereof between said terminal and the rail terminals of your petitioners on the western shore of New York Harbor.

"Under and pursuant to said contracts the said Jay Street Terminal lighters or floats eastbound freight from the rails on the western shore of New York Harbor to the docks, wharves and float bridges at Brooklyn and there unload it from said lighters or floats and delivers it to the consignees; it receives westbound freight from the shippers and lighters or floats it to the said rails. It assumes full responsibility on all freight while in its possession on behalf of your petitioners and agrees to indemnify your petitioners for all moneys paid out to consignees or to consignors for loss or damage to freight while in its possession. It is agreed that a competent superintendent shall be kept upon the premises, who shall carry out the directions of your petitioners, and said superintendent has authority to issue bills of lading on behalf of each of your several petitioners for westbound freight and to sign the same as agent of your petitioners, which is done, and the said Jay Street Terminal agrees to be responsible for all claims, injuries, or damages arising from their improper issuance. It also agrees to be responsible for and pay to your petitioners

all freight charges on eastbound freight and all freight charges payable in advance on westbound freight, and accordingly collects and accounts for the same. It agrees to insure against loss or damage by fire or marine risks all freight, cars, or property while in its possession, received by it under the provisions of said contracts, said insurance to be for the benefit of your petitioners and others as their interests shall appear. It also agrees to enforce the car-service regulations of your petitioners as established from time to time and filed and published in accordance with the act to regulate commerce and the amendments thereof and supplements thereto. It performs the movement in either direction of empty cars between the Jay Street Terminal and your petitioners' terminals on the west shore of New York Harbor; issues waybills and performs other necessary clerical services and in general furnishes all facilities and performs all work and services required for the receipt or delivery of freight as at any public station of petitioners, and for the transportation of said freight between the Jay Street Terminal and your petitioners' terminals on the west shore of New York Harbor."

"For these services and facilities the railroad companies pay to Jay Street Terminal and aggregate compensation figured on the freight handled for it upon a rate of $4\frac{1}{2}$ cents per hundred pounds on freight originating at or destined to points on or west of the westerly limits of trunk line territory-so-called-and 3 cents per hundred pounds on freight originating at or destined to points east of the westerly limits of the trunk line territory. *The same allowance for handling freights are paid to other terminal companies furnishing similar services in New York*" (225 U. S., 317).

These other Terminal Companies which receive the same compensation namely: Bush Terminal Company, New York Dock Company, Brooklyn Eastern District Terminal Company produce not a pound of freight and this disposes of the gratuitous assumption by the Commission and by Judge MACK in the

face of the allegations of the petitions that the different prices for the same services was intended to give a rebate to Arbuckle Brothers. This was the established price before Jay Street Terminal was created and is the price paid the Terminal Companies which ship not a pound of their own merchandise. The Messrs. Arbuckle and Jamison who own and operate the Jay Street Terminal own and operate also a sugar refinery. Sugar refined by them is carted

"to the terminal by said Arbuckle and Jamison and handled at the terminal in the same way as the freight of hundreds of other shippers and the freight charges thereon are collected from the said Arbuckle and Jamison by the Jay Street Terminal in accordance with the regularly published tariffs of your petitioners. That approximately four-fifths of the shipments of sugar made by Arbuckle and Jamison through said Jay Street Terminal are sold by said Arbuckle and Jamison, f. o. b Brooklyn and become the property of the consignee immediately upon delivery to the terminal. * * *. That the profits in the operation of the Jay Street Terminal on all shipments during the same period amounted to less than three per cent, on the investment without making any allowance for depreciation or interest."

The merchandise passing through the Jay Street Terminal in 1910 may be tabulated thus:

General merchandise	56%	343,280 tons.
Arbuckle sugar consigned to pur- chasers.....	35.2%	215,776 "
Arbuckle sugar consigned to Ar- buckle Brothers.....	8.8%	53,944 "

All of the Judges of the United States Commerce Court held that all of the general merchandise and all of the sugar shipped from the Jay Street Terminal is delivered to the carriers at Jay Street Terminal where the liability of the carrier

begins and where begins also the interstate carriage (See opin. CARLAND, J., Rec., p. 118; opin. MACK, J., Rec., p. 119).

The contract which is annexed to the answers of the railroads and which is taken as the type of all the contracts was made with the Erie Railroad Company in February, 1906, to run until 1910, and thereafter until terminated by ninety days' notice (Rec., p. 15).

In May, 1907, Federal Sugar Refining Company of Yonkers filed its complaint with the Commission. The complainant and its refinery were located at Yonkers, ten miles north of the lighterage limits. The refinery is situated on the shore of the Hudson River and on the other side of it are the tracks of the New York Central Railroad Company, by which it shipped eighty-five per cent. of its product. It shipped fifteen per cent. of its sugar by the defendant railroad companies and carried this sugar direct from the refinery at Yonkers to the rail terminals on the New Jersey shore of New York Harbor in the lighters of the Ben Franklin Lighterage Company, paying three cents per 100 pounds for the loading, unloading and lighterage. The first complaint alleged that the American Sugar Refining Company through Brooklyn Eastern District Terminal Company and Arbuckle Brothers through the Jay Street Terminal Company floated or lightered sugar to the defendants' terminals and that an allowance was made by the defendants to the refiners and that defendants refused to make any allowance on shipments of sugar delivered by complainants via Ben Franklin Transportation Company's lighters to the defendants' terminal. The complaint further stated the free lighterage limits and alleged :

" that complainant's refinery is within the port of New York, under and by virtue of an act of Congress approved May 7, 1894, which includes Yonkers within the port of New York, and entitles complainant's refinery located in Yonkers to the same port privileges as are extended to refineries in Brooklyn." (Rec., p. 20.)

It alleged that the allowances to the Brooklyn refineries and the refusal of them to the complainant unjustly discriminated against it and preferred the Brooklyn refineries. The petition asked as relief (Rec., p. 22) "*that the Commission determine what is a reasonable allowance as to maximum that defendants shall pay to complainant for the service of lightering said shipments of sugar to said terminal; that an order be entered requiring said defendants either to withdraw such allowances or free service granted to said Brooklyn refineries, in the manner aforesaid, * * * or to make similar allowances to complainant on its shipments.*" It appeared in the course of the hearing that the American Sugar Refining Company and the Brooklyn Eastern District Terminal were wholly separated in ownership and they were not considered in the final disposition of the case.

The Commission held (Rec., p. 24) :

"1. By their lighterage regulations defendants have, in the only available manner, extended their lines to New York, but such extension results from the exercise of business discretion, not from compliance with any requirement of the act to regulate commerce; and by such extension defendants incur no liability, under the act, to extend their lines to Yonkers or other nearby communities.

"2. The identity of ownership between the Jay Street Terminal in Brooklyn and the adjoining refinery in Brooklyn is a relationship which should be subjected to the closest scrutiny. The only inference which can be drawn from the present record is that the Jay Street Terminal does not earn in excess of a reasonable return upon the investment. The 15th section of the act clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation, and nothing has been made to appear which indicates that the allowance in question exceeds the authorized measure of compensation."

Three Commissioners dissented and held (Rec., p. 36) :

" In a word, as between two shippers competing in the same line of business, a carrier may not lawfully discriminate under a contract of this nature even when entered into in good faith in order to supply itself with needed facilities. If such an allowance is made to one shipper for the service rendered and instrumentalities furnished by him in getting his sugar into the hands of the defendants at Jersey City, it is unlawful to withhold a similar allowance from the complainant for doing precisely the same thing with its sugar. The fact that its refinery is outside the lighterage limits is of no significance. The burden of its additional distance is its misfortune. But it is entitled to deliver its sugar into the possession of the defendants at Jersey City upon exactly equal terms with Arbuckle Brothers. If the trunk lines do not see fit to extend their services to Brooklyn with their own equipment but choose to farm out that service to the concerns controlling the immense sugar tonnage to the westward (which it has been testified by Vice-President Caldwell, of the Delaware, Lackawanna & Western Railroad, is 30 per cent. of the total tonnage westbound out of Greater New York), then they should be compelled to so adjust the arrangement that no discrimination will be caused by it."

This interpretation of Section 15 wholly disregards the difference between instrumentalities and services after railroad transportation begins and accessorial services or else it holds that the railroad which extends its service from Jersey City to Brooklyn must extend also to Yonkers.

Commissioner Clark concurring with the majority ruled that the railroads are not bounden to extend their service to Yonkers, but he was of "opinion, if complainants were located within the lighterage limits the defendants could not lawfully permit complainant's competitors to lighter their sugar and receive pay for that service and refuse to permit complainant to lighter its sugar and receive the same compensation for that service."

I argue hereafter that if lighterage by the Federal Company and flotage by Jay Street Terminal are legal equivalents and must be paid for at the same rates it does not follow that the Federal Company must be paid for lighterage as much as Jay Street Terminal is paid for flotage plus all its instrumentalities and services on shore.

The decision of the Commission was made June 24, 1909. The complainants reorganized their company, changed its name by dropping the last two words "of Yonkers," located the principal office of the new company in the Borough of Manhattan, City of New York, stopped the lighters of the Ben Franklin Lighterage Company at Pier 24, North River, "where certain formalities with reference to shipping were had for the purpose of making it appear as a matter of law that these shipments were made not from Yonkers, but from Pier 24, North River, a point within the lighterage limits" (225 U. S., 319). "A new complaint was filed with the Commission setting forth the same grounds of discrimination as the prior one, but on the theory that the decision of the Commission did not apply because shipments of the Federal Sugar Refining Company were now lightered from Pier 24, a point within lighterage limits and not from Yonkers. The Commission held, as a matter of law, that the stoppage of the lighters of the Ben Franklin Transportation Company for instructions at Pier 24, differentiated the case from the former one" (225 U. S., 319). The new demand of the Federal Company was for the same compensation 3 cents and 4½ cents per 100 pounds, and the demand was now made for the short, simple and inexpensive service of moving the lighter across the Hudson River from Pier 24 to the New Jersey rail terminals.

In his dissenting opinion upholding it, Judge MACK stated the plaintiff's theory (Rec., p. 122):

"The present proceeding, however, was brought by the Federal Company not in the capacity of a Yonkers refinery, primarily to prevent, as between localities, the

undue prejudice forbidden by section 3, but in its capacity of a vendor and shipper of sugar from pier 24, primarily to prevent as against it the unjust discrimination forbidden by Section 2 of the act. Only in that capacity is it to be dealt with in this case and therefore it is immaterial how, whence, or at what cost it gets its sugar at that pier."

The case would be the same if the sugar were beet sugar and had been imported from Germany, and was still in the hold of the ocean steamship. Judge MACK further stated of the complainant (Rec., p. 120) :

" It brings its goods to pier 24 primarily or solely to get them within the lighterage limits." " That it has never demanded and does not want free lighterage from pier 24." " The transportation of its goods by the railroads begins in Jersey City."

Judge MACK further stated the contention of the complainant, as follows (Rec., p. 122) :

" Of course, at the present time, the Federal Company cannot offer its goods to the railroads at Pier 24. As it does not want free lighterage, and as the railroads will not accept them at Pier 24 by issuing through regular agents or through the Federal Company itself, acting as their agent, the necessary bills of lading, and permitting the Federal Company as their paid agent thence to transport them to Jersey City under covenants similar to those found in the Jay Street Terminal contracts, it would seem to be utterly useless for the Federal Company to do anything more than it is doing. It says: ' Our sugar is at Pier 24; it is already loaded in lighters; we want bills of lading for the through transportation from this point, and we demand for similar compensation, the privilege of performing a part of the transportation service, that between the lighterage points, Pier 24, and Jersey City, a privilege substantially similar to that which you grant Arbuckle Brothers.' "

The italics are mine. The demand then is that the carriers make Pier 24 a station in New York for the receipt of complainant's sugar and maintain there an agent to issue bills of lading or appoint the Federal Company such an agent.

The Commission held, and Judge MACK would uphold the ruling, that the Jay Street Terminal and the Federal Company perform identical services, and that to pay for one and refuse the same price to the other unjustly discriminates against the latter. Jay Street Terminal owns and operates a great union public terminal assessed for taxation at more than one million, seven hundred thousand dollars, equipped with a freight house, rails, stands, platforms, locomotives, piers, float bridges, docks and car floats, with a large organization. It carries in cars on car floats, for the public, east and westbound freight, to and from Brooklyn, amounting in 1910 to 613,000 tons and is responsible for all this freight; it issues bills of lading for and in the name of the carriers and is the public station of all the railroad companies. The lighters of the Ben Franklin Company carry nothing except the complainant's sugar and are used to get the product of the Yonkers Refinery to the railroads and for no other purpose.

Judge MACK drew a line separating a part of the instrumentalities and services furnished by Jay Street Terminal from the rest. On one side he placed what he decided to be transportation service and on the other "work that in and of itself has no necessary connection therewith." The latter he calls "rent and wages as terminal managers."

Let us assume that the carriage of the Federal sugar in lighters from Pier 24 and of Arbuckle sugar from Brooklyn in car floats is identical. The question then is whether the Commission can wholly disregard the service of Jay Street Terminal on shore and order the carriers to pay the Federal Company as much for the service afloat as they pay Jay Street Terminal for the instrumentalities ashore and afloat. Can the Commission decide that a part equals the whole? Is the shore service of Jay Street Terminal negligible?

It is not true that the shore service of Jay Street Terminal "in and of itself has no necessary connection" with its service afloat. The allegation of its petition is as follows (Rec., p. 86):

"IV. The Jay Street Terminal owns real estate bordering the East River in the Borough of Brooklyn, at or near the foot of Bridge Street, extending along the East River about 1,200 feet, and 600 feet deep. It has projected piers from this upland into the waters of the East River. Upon the upland it has built freight houses, warehouses, and a railroad yard with railroad tracks reaching and extending to and over a float bridge. It also owns and operates locomotive steam engines, tugboats steam lighters, barges, and car floats. The value of the real and personal property in use in the business of Jay Street Terminal exceeds \$2,000,000. The real estate is assessed for taxation by the city of New York, for the year 1911, at above \$1,700,000. By the contracts set forth in the next paragraph hereof the Jay Street Terminal has devoted its real and personal property to the public uses served by the complainant railroad companies."

The eastbound loaded and empty cars must be switched from the floats to the yard, platforms, freight house, or storage tracks and unloaded. Later they must be brought to platforms, loaded, switched and placed on the car floats. Bills of lading must be issued, way bills sent, freight moneys collected and paid over. *These are all services which the shipper and consignee of freight from and to Jay Street Terminal can compel the carrier to render.*

The further allegation of the petition fully supported by the contract is that the 3 cents and 4½ cents per 100 pounds is paid for all these services on shore and afloat (R. R. Pet., par. 4, p. 4; Jay St. Term. pet., fols. 157, 158). If the Commission reached an opposite conclusion it is as the petition asserts wholly unsupported by evidence.

If Jay Street Terminal were not owned and operated

by Arbuckle and Jamison who compose Arbuckle Brothers, the complaint of the Federal Company would have been dismissed without question. The services rendered by Jay Street Terminal Company and the circumstances are wholly dissimilar from the service rendered by Ben Franklin Lighterage Company. The order of the Commission rests solely upon the fact that the owners and operators of the terminal refine sugar at another place and at another time and organized as a wholly separate firm and then deliver the sugar to Jay Street Terminal. The common ownership of refinery and terminal is only relevant because of the payment of the so-called allowance. These are not allowances at all for the complaint alleges and the fact is, that Arbuckle Brothers and the purchasers of sugar from them pay full freight charges. The Jay Street Terminal is separately paid for its services. If these payments are reasonable and certainly if they do not exceed the cost of the service, the refiner who operates a terminal has no financial advantage over the refiner who does not. This is brought out clearly by the failure of the Federal Company to include in its second attack The American Sugar refinery and the Brooklyn Eastern District Terminal. The sugar refined by the American Sugar Refining Company is delivered to the railroads at Brooklyn Eastern District Terminal. The complainants believed that the terminal and refineries were held in common ownership. When it was learned that the refinery had no interest in the terminal the attack ceased, and yet The American Sugar Refining Company by delivery at the Brooklyn Eastern District Terminal has to-day all the advantage that Arbuckle Brothers have at Jay Street Terminal, and the American Company is relieved of the loss which follows the employment of capital in a terminal at less than the rate which capital earns in a refinery. If the order of the Commission is enforced the American Company will have its advantages increased. It may forsake Brooklyn Eastern District Terminal and lighter its sugar at

a profit, and this in the face of decision of the Commission not reversed by this Court in the Peavey case, that the compensation to a shipper who furnishes an instrumentality of transportation, or performs a portion of the service of transportation, may not exceed the cost of the service.

And if the privilege is accorded to the Federal Company as a vendor shipping sugar from pier 24, every one of the great grocery houses in New York City who ship sugar by the hundred barrels from their warehouses may demand and must receive equal compensation and have the transportation of their sugar begin at their warehouses and bills of lading issued there, and if Jay Street Terminal is paid for receiving other freights, why shall not the grocer also be paid for moving anything and everything he ships for himself and for others.

POINT I.

The petitions present questions of law.

It was conceded in the Commerce Court that whether the transportation of the Arbuckle sugar begins in Brooklyn or in Jersey City is a question of law to be determined by the Court (Opin. MACK, J., Rec., fol. 221).

All the Judges held that this rail transportation begins in Brooklyn (Opin. CARLAND, J., fol. 217; Opin. MACK, J., fol. 221).

The remaining question was also conceded to be a question of law. Mr. Bigelow said "I take that to be a question of law, not of fact—a question of law as to whether section 15 authorizes the giving of that privilege to one shipper and withholding it from another shipper." Are the instrumentalities and services of transportation performed by the Jay Street Terminal "identical" as the Commission finds or substantially similar with the services of the Federal Com-

pany? Are the latter transportation services? Are they not accessorial?

The Commission according to Judge MACK separated the services and instrumentalities of Jay Street Terminal on shore from those afloat and found the latter identical with the lighterage by the Federal Company. This presents a question of law with undisputed facts.

The carriers pay Jay Street Terminal three cents and four and one-fifth cents per 100 pounds for all instrumentalities and services on shore and afloat. Assuming as we must that this is the reasonable compensation can the Commission without violating Section 15 decree equal pay to the Federal Company for the service afloat without inquiry whether this is transportation and the compensation reasonable. Can the Commission make any part equal to the whole.

At the time of writing this brief, the counsel for the United States have not filed theirs and I am compelled to resort to the argument before the Commerce Court for their contention. Mr. Denison said in answer to Judge KNAPP (Minutes, p. 8): "I say it was competent for the Commission to decide, reasonable for them to decide on the facts before them that the rail transportation began at Jersey City. *If the transportation began at Jay Street Terminal, then there is nothing left of the order.* If there is any legal rule that requires this Court to say, notwithstanding the physical facts, notwithstanding the contract by the parties, that that transportation begins at the Jay Street Terminal, then the order of the Commission must fall except as to the question of discrimination in the refusal to receive the Federal Company's goods within the lighterage limits." And again (p. 9): "But suppose the transportation does begin at the Jay Street Terminal as a matter of law. Why is there not discrimination against the Federal Company by the refusal of the railroads to give them free lighterage from Pier 24 within the lighterage limits? It is true they have not taken their sugar

out of their lighter. Is there any real substantial occasion to say that it is not proper for the Interstate Commerce Commission to consider that the delivery was refused? JUDGE MACK: The Federal Company does not care whether they take it or not at Pier 24. That is a material point in the case. MR. BIGELOW: That is true, your Honor."

The controlling questions argued before the Commerce Court were these two and were both decided to be questions of law.

(a) Does the transportation of Arbuckle sugar begin at Brooklyn.

(b) Does the contract with Jay Street Terminal unlawfully prefer Arbuckle Brothers and prejudice or discriminate against Federal Company.

It is the position of these intervening petitioners as set forth repeatedly in their petition, that the order of the Commission was made *wholly* without the support of any evidence—without even the mere "*scintilla*" of proof which has been stated by the Supreme Court to be insufficient to sustain an order of the Commission, as is shown below.

The intervening petition of Jay Street Terminal alleges again and again "Such finding is wholly unsupported by evidence."

See petition, Pars. XI. to XX.

Whether there is evidence to support or tending to sustain a finding of fact is always a question of law.

People *ex ret.* Stephenson vs. Bingham, 205 N. Y., 168, and see cases cited.

Tug "Packer" vs. N. J. Lighterage Co., 140 U. S., 360.

The recent cases in the Supreme Court show clearly that the mere fact that the Commission has found in this case in spite of these undisputed facts, that the circumstances and conditions surrounding the services performed by the

Federal Company and these intervening petitioners are substantially similar and that the payment to the Jay Street Terminal is an undue preference or discrimination does not preclude this Court from examining these undisputed facts in order to *see whether as matter of law* these facts present a case within the terms of the statute and thus within the *power* of the Commission. The intervening petition of the Messrs. Arbuckle and Jamison states (Par. XVI., Rec., p. 95) :

“ XVI. That the commission violated the constitutional rights of your petitioners, exceed the powers delegated to it by law, and otherwise erred in its report and order in finding that Arbuckle Brothers and the Federal Sugar Refining Company provide similar facilities and perform the same service in the transportation of their Property to the terminals of complainant railroad companies on the western shore of the Hudson River. Such finding is wholly unsupported by evidence.”

The undisputed facts will, we submit, compel the conclusion of law that the circumstances and conditions of the offer made by the Federal Company are substantially dissimilar from the services and instrumentalities furnished by Jay Street Terminal and that no undue or unreasonable preference or advantage is given to Arbuckle Brothers and that the Federal Company is not subjected to any undue or unreasonable prejudice or disadvantage.

One of the last expressions of the Supreme Court upon the question of the extent of the jurisdiction of this Court and of the Supreme Court in reviewing orders of the Commission is found in the case of

I. C. C. vs. B. & O. R. Co., 225 U. S., 326, 339-341.

In that case the Commission had held that it was an unlawful discrimination on the part of a railroad company to

charge a lower rate for the transportation of railroad fuel coal than for commercial coal and had made a finding that the circumstances and conditions of the carriage of both kinds of coal were not substantially different. The Court says (at page 339) :

"The companies contend that the Commission applied these sections to the facts found by the Commission, none of them being disputed, and that, therefore, the findings of the Commission are conclusions of law. On the other hand, the Commission charges that its findings are those of fact and exclusively within its jurisdiction, and not open to review by the Commerce Court or any court. * * *

"The facts are certainly undisputed, or, to put it differently, the circumstances and conditions which determined the order are certainly not in controversy; and while certain general inferences are disputed which may be called inferences of fact, yet we think, 'power to make the order, and not the mere expediency of having made it, is the question' presented. *Int. Com. Com. vs. Ill. Cent. R. R. Co.*, 215 U. S., 452, 370. * * *

"*The issue of principle between the Commission and the companies is very accurately presented, and we come to consider whether there are differences in the traffic of fuel coal which distinguish it from traffic in commercial coal, and which, as contended by the companies, make the traffic dissimilar in circumstances and conditions or whether the opposite is true, as decided by the Commission.*"

The question presented by the intervening petition also comes squarely within the following decisions of the Supreme Court holding that the Commerce Court has authority to review orders of the Commission where question of *power* rather than *expediency* are involved.

I. C. C. vs. Ill. Cent., 215 U. S., 470.

I. C. C. vs. Union Pac., 222 U. S., 541, 547.

Other instances of this same right to review the findings of the Commission, although they may superficially appear to be findings of fact, are not wanting.

I. C. C. vs. Stickney, 215 U. S., 98.

This Court affirmed an injunction by the Circuit Court suspending an order of the Interstate Commerce Commission, which reduced the charge of a terminal railroad (164 Fed., 638).

Thus a finding by the Commission that carriage was performed under substantially similar circumstances and conditions was reviewed and reversed by the Supreme Court in the case of

I. C. C. vs. Ala. Midland Ry. Co., 168 U. S., 144.

Similarly a finding by the Commission, in ordering the establishment of through routes, that no reasonable or satisfactory through route already existed, was reviewed and reversed in the case of

I. C. C. vs. No. Pac., 216 U. S., 538.

A finding by the Commission that the payment to a shipper of even the reasonable cost of performing a transportation service would create undue preference and unjust discrimination was reviewed in the case of

I. C. C. vs. Difffenbaugh, 222 U. S., 42.

Also a finding by a State Railroad Commission that there was a public necessity for additional trackage, sidings and connections, was reviewed in the same manner and reversed in the case of

Ore. R. & N. vs. Fairchild, 224 U. S., 510.

In all these cases there was obviously as much if not more ground for holding the findings of the Commission to be findings of fact, and yet in every case the Supreme Court has examined and reviewed the findings as being in reality conclusions of law based upon facts not substantially in dispute.

POINT TWO.

The order is beyond the power of the Commission.

1. It forbids what is lawful.
2. It commands what is unlawful.

To pay the Jay Street Terminal is found by the Commission, or assumed to be, lawful and is permitted to be continued if the railroads pay the same compensation to the Federal Company, but otherwise, is forbidden.

To pay Federal Company 3 cents and $4\frac{1}{2}$ cents per hundred pounds is unlawful because;

- (a) It does not furnish any instrumentality or service of transportation;
- (b) The compensation is not reasonable and is not decided by the Commission to be reasonable;
- (c) It would pay Federal Company a profit while Jay Street Terminal works at or below cost. If the latter and Arbuckle Brothers are identical, this works discrimination.

The order must find its support in section 15, paragraph 3, of the Act, as amended in 1896, which provides as follows:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge therefor shall be no more than is reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge."

All the services and all the instrumentalities of the Federal Company used before the delivery of its sugar to the carriers at Jersey City are accessorial to transportation and the carrier

is forbidden by the Act to pay the shipper for accessorial services.

Wight vs. U. S., 167 U. S., 512.

Chic. & Al. R. Co. vs. U. S., 156 Fed., 558.

Gen'l E. Co. vs. N. Y. C. & H. R. Co., 14 I. C. C., 237.

Solvay Process Co. vs. D. L. & W. R. Co., 14 I. C. C., 246.

Matter Allowance for Transfer of Sugar, 14 I. C. C., 619.

In the last case the Commission had before it the payment by Railroad Companies to all refiners in and about New York for the transfer of sugar from the refineries to the several railroads and among others the Federal Company and Arbuckle Brothers. The railroads allowed two cents per 100 pounds for carrying sugar in trucks or by hands or otherwise to the railroad. The Federal Company moved its sugar at Yonkers to the New York Central terminals by hand trucks, making store door delivery directly into the railroad cars. Arbuckle Brothers moved their sugar by horse drawn trucks, several blocks from the Arbuckle refinery, to the Jay Street Terminal. The American Sugar Refining Company moved their sugar in horse drawn trucks from the refinery to the Brooklyn Eastern District Terminal. The Commission held that the payments were unlawful.

No difference in principle exists between the carriage in trucks by the American Company to the Brooklyn Eastern District Terminal and by Arbuckle Brothers to the Jay Street Terminal and the carriage in lighters by the Federal Company from Pier 24 to the Jersey Terminals. And since the allowance for carting sugar in trucks to the railroad terminals is held to be unlawful, so must also be held unlawful the payment of any allowance to the Federal Company for lightering sugar across the North River.

The logic of the report and order of the Commission leads inevitably to the payment to the American Sugar Refining

Company of 3 cents and 4½ cents per 100 pounds for carrying their sugar in trucks from their refineries to the Brooklyn Eastern District Terminal, in place of the 2 cents per 100 pounds which the Commission forbade.

The Commission has ignored the distinction between such an accessorial lighterage service before transportation begins as the Federal Company furnishes and the maintenance of the railroad terminal in Brooklyn and the transportation thence of freight by Jay Street Terminal.

Judge MACK perceived the weakness of the claim for pay for a delivery to the railroads and met it boldly. The learned Judge states the demand of the Federal Company, as follows (Rec., 122) :

It says: 'Our sugar is at Pier 24; it is already loaded in lighters; we want bills of lading for the through transportation from this point, and we demand, for similar compensation, the privilege of performing a part of the transportation service, that between the lighterage point, Pier 24, and Jersey City, a privilege substantially similar to that which you grant Arbuckle Brothers.'"

The learned Judge holds that the carriers must make Pier 24, Manhattan, their station for the receipt of sugar and the Federal Company station agent, to sign bills of lading.

I endeavor in the next point to show the error of this rule.

(b) The Commission did not consider whether 3c. and 4½c. would be a reasonable charge or allowance for the Federal lighterage. On the face of it it is unreasonable.

The Report of the Commission states (Rec., p. 47) :

"For its services in taking the sugar first to Pier 24 and then, after receiving the instructions and bills of lading in carrying across the River and making delivery at the rail ends of the defendant carriers, the Ben Franklin Transportation Company, under its contract with the complainant, demands and receives 3 cents per 100 pounds."

The Commission is here deciding that a very small part is greater than the whole. Yonkers is ten miles north of the lighterage limits. This 3 cents pays for loading and unloading and for a carriage of from $13\frac{1}{2}$ to 20 miles (Rec., p. 28). The order of the Commission commands that 3 cents and $4\frac{1}{2}$ cents be paid for a carriage across the river, the bulk of which will not exceed two miles and the maximum of which will be seven miles. The Commission clearly exceeded the maximum of its power, which was to find and decide the reasonable charge or allowance to the Federal Company and order it paid. There is not a line in the report to suggest that the Commission considered the reasonableness of the proposed payment to the Federal Company. The petition of Jay Street Terminal alleges that the finding of the Commission in this particular respect "is wholly unsupported by evidence" (Rec., p. 95, Par. XIX.).

POINT THREE.

The payment to Jay Street terminal for transportation service and the refusal of the carriers to pay Federal Sugar Refining Company for its accessorial services do not work a discrimination.

The contract of Jay Street Terminal with the Erie Railroad was made February 5, 1906. It was lawful and worked no discrimination. It continued lawful and worked no discrimination until July 13, 1909, when the Interstate Commerce Commission had dismissed the complaint of the Federal Sugar Refining Company of Yonkers (p. 38). On July 20, 1909, the date set forth in the petition of the Federal Sugar Refining Company (p. 40) it is held to have become unlawful and a discrimination because Mr. C. A. Spreckels and his

associates had deliberately changed their corporate name and residence and now stopped their lighter at Pier 24, North River, on the way from Yonkers, to the railroad terminals in New Jersey with the express purpose of bringing themselves within the opinion of Commissioner Clark in the first case.

In short, the plaintiff deliberately created the discrimination for which it has been adjudged entitled to relief.

Judge MACK's answer to this argument, is as follows (Rec., p. 122):

"The present proceeding, however, was brought by the Federal Company not in the capacity of a Yonkers refinery, primarily to prevent, as between localities, the undue prejudice forbidden by section 3, but in its capacity of a vendor and shipper of sugar from Pier 24, primarily to prevent as against it the unjust discrimination forbidden by section 2 of the act. Only in that capacity is it to be dealt with in this case, and therefore it is immaterial how, whence, or at what cost it gets its sugar to that pier."

The question is therefore whether the railroads must pay a shipper of sugar in Manhattan borough for carrying his sugar to the rail terminals in Jersey City if sugar of a Brooklyn refiner is received at a public railroad terminal in Brooklyn owned by the refiner of this sugar and operated by him for the railroads.

The case of the Federal Company would surely be stronger if it were at the Brooklyn shore and offered to furnish exactly similar facilities as Jay Street Terminal furnishes. Take the case of the American Sugar Refining Company, which is in Brooklyn, and in 1910 shipped from the Brooklyn Eastern District Terminal over 400,000 tons of sugar. That terminal is on the waterfront immediately adjacent to the "American Refineries." The discrimination, if one exists, is as great against the American Company, as against the Federal Company. Assume that the American Company complained

and offered to furnish a terminal station adjacent to its refinery and upon the same terms. It is submitted that the railroad companies could refuse upon the ground that they had established a sufficient terminal to receive and deliver and carry all freight ; their duty being to provide reasonable facilities. It has been held in this Court that it is not a violation of the Act to make an exclusive contract for terminal facilities, and that the railroad having made such a contract with one company could refuse to make deliveries at another.

The reason of the rule is thus stated in a recent text. (Interstate Commerce Act, Drinker, Vol. 1, p. 214.)

"THE ABOVE PROVISIONS OF THE ACT RELATE ONLY TO PERFORMANCE OF DUTIES QUA COMMON CARRIER."

"The prohibition of preferences and discriminations relates only to such discriminations and preferences as are incident to the performance of a common carrier, and does not prevent a railroad, when not performing such duties, from dealing exclusively with one individual. Thus it may properly lease all its refrigerator cars from one company, though the latter be also a large shipper, or may refuse to haul a certain make of private cars, or may agree to send all the live stock shipped over its line to or from a certain point through a certain stock yards, to the exclusion of a rival stock yards company situated at the same point ; or it may give a certain hack driver exclusive privileges for securing the patronage of its passengers in its depots."

Cen. Stockyards Co. vs. L. & N. R. Co., 192 U. S., 568.

Covington S. Y. Co. vs. Keith, 139 U. S., 128.

U. S. vs. D., L. & W. R. Co., 40 Fed., 101.

The Commission has held that it is lawful for a railroad to procure equipment by lease from one shipper and to refuse to make identical contracts with other shippers.

Consol. Forwarding Co. vs. So. P. Co., 9 I. C. C., 182.

Worcester Ex. Co. vs. P. R. Co., 3 I. C. C., 577.

The opinion of the Commission in the matter of refrigerator cars is instructive.

Matter of Trans. of Fruit, 10 I. C. C., 360.

The Commission investigated the subject upon its own motion, after complaints from shippers of fruit in Michigan, that railroads had made exclusive contracts for the use of Armour cars. Commissioner Prouty wrote (p. 373) :

“ The defendant railways may provide such cars either by purchase on their own account or by lease from other roads, and if the latter plan is adopted they may undoubtedly enter into exclusive contracts like that before us. This has been settled by the Supreme Court of the United States (Pullman Palace Car Co. v. Missouri P. R. Co., 115 U. S., 587; 29 L. Ed., 499; 6 Sup. Ct. Rep., 194. Express Cases, 117 U. S., 1; 29 L. Ed., 791; 6 Sup. Ct. Rep., 542, 628). Still more directly in point are those cases in which it has been held that a railway may provide facilities for receiving and delivering live stock by the making of an exclusive contract with one or two more stock yards operating at the same point (Central Stock Yards Co. v. Louisville & N. R. Co., 192 U. S., 568; 48 L. Ed., 565; 24 Sup. Ct. Rep., 339. Railroad Commission v. Louisville & N. R. Co., 10 I. C. C. Rep., 173). ”

Commissioner Prouty, we submit, correctly interprets the decision of this Court in the Central Stockyards case that a railway may provide facilities for receiving and delivering live stock by making an exclusive contract with one shipper and refusing another shipper at the same point, and it follows that it may make the contract under review with the Jay Street Terminal and refuse the contract demanded by Federal Company.

A study of the Brooklyn Eastern District Terminal and the American Sugar Refining Company will be instructive. In

the first case the Federal Company complained of Arbuckle Brothers and the Jay Street Terminal and of the American Sugar Refining Company and the Brooklyn Eastern District Terminal. It was proved that the interest of the American Company in Eastern District Terminal was "a negligible quantity."

The Report in the first case states (Rec., p. 30):

"The relationship existing between the American Sugar Refining Company and the Brooklyn Eastern District Terminal by means of stock ownership in the former by members of the firm who own the latter, is apparently so slight as to require no comment and that question was virtually waived on the hearing."

"Moreover, it is evident that the disadvantage of complainant does not arise from the fact that Arbuckle Brothers own and operate the Jay Street terminal, but rather and simply from the fact that they are within while complainant is outside of the free-ligherage district. If Arbuckle Brothers should transfer that terminal to the defendants, or to an outside party and cease to have any interest in it whatever complainant would derive no appreciable benefit." (Rec., p. 32.)

The fact is that Havemeyer and Elder owned a refinery adjoining the Brooklyn Eastern District Terminal and owned also that Terminal. They sold their refinery to the American Sugar Refining Company (Report, Rec., p. 27). The American Company continued to have all the facilities of the terminal. When the Federal Sugar Company made its second complaint it omitted all reference to the American Company or to the Brooklyn Eastern District Terminal. This, it is submitted, virtually admits that Arbuckle Brothers have no advantage from the Jay Street Terminal.

The Report answers the argument that no discrimination exists because the railroad companies can lawfully buy or rent the terminal and the discrimination against the Federal Com-

pany would remain. The learned Commissioner wrote (Rec., p. 52) :

“ A carrier may doubtless wrongfully give a great shipper a substantial advantage by buying or renting his warehouse adjoining his factory or place of business and making it a public receiving station, thus relieving him of the expense of hauling his merchandise by wagon to its regular receiving station. *And possibly under the act as it now stands we would be powerless to redress the wrong, if the public made actual use of the new station, unless the price paid or the rent reserved were excessive and the transaction was therefore intended as an unlawful rebate as well as a continuing daily advantage to that shipper.* But when the carrier engages the shipper to operate his warehouse as a railroad terminal and in the arrangement gives him advantages in handling his own traffic that are denied to his competitor, the test proposed, as above described, does not satisfy the principle underlying the act, as we shall see more fully, later in this report.”

The italicized clause is submitted to be the conclusive answer to the whole argument of the Commission, for it is nowhere pretended that the compensation of Jay Street Terminal is excessive.

The “advantages in handling his own traffic that are denied to his competitor” were stated by Mr. Farrell in this Court, to be freedom from risks of negligence, to which might be added more rapid and certain delivery. The Peavey case is the answer to this proposition.

The counsel for the United States, in his brief in the Court below, wrote as follows (p. 49) :

“ The reasonableness *per se* of the allowance paid by the carriers to Arbuckle and Jamison has not been passed upon by the Commission, nor does that question affect in any way the discrimination between Arbuckle and Jamison on the one hand and the Federal Sugar Refining Company on the other.”

Counsel for the Federal Company in the second case did not accept the offer of the Commission to investigate the financial results, and in his brief in the Supreme Court in the former appeal Mr. Bigelow writes (p. 13) :

“ These facts and inferences are brought here to the attention of the court not at all with the idea of showing that the allowance made to Arbuckle & Jamison is unreasonable within section 15 ; counsel has consistently refused to develop that side of the evidence, resting his case on the contention that, as transportation by the carriers begins on the rail terminals on the New Jersey shore, *any* allowance to Arbuckle, whether more or less than their lighterage cost, is rebate, and a discrimination against the Federal Company.”

These are as direct admissions as could be expected that the compensation to Jay Street Terminal is less than the cost of the service it renders and the instrumentalities it furnishes. This was found in the first case (p. 28) and conceded in the second Report (Rec., p. 50).

The Jay Street Terminal contract is not, therefore, a financial advantage to Arbuckle Brothers, and the Solicitor General falls into error in assuming that it is a financial disadvantage to the Federal Company and a hindrance in its competition “for the western trade.”

POINT FOUR.

The payments to Jay Street Terminal by the carriers were made for services and instrumentalities used in transportation and are expressly permitted by the Statute.

Jay Street Terminal is a Brooklyn station of the trunk lines where freight is received and bills of lading issued,

freight is loaded into cars and "floated" to the rail terminals at Jersey City.

Petition of Jay St. T., Par. VI., p. 86.

The merchandise is divided as follows:

General merchandise	56	per cent.
Sugar consigned by Arbuckle Bros. to purchasers	35.2	" "
Sugar consigned by Arbuckle Bros. to themselves	8.8	" "

The tonnage handled by Jay Street Terminal in 1910 was over 600,000 tons and by the Brooklyn Eastern District Terminal over 1,000,000 tons.

The necessity of these terminals is thus stated by Commissioner Lane dissenting in the first case (Rec., p. 33).

"The railroads ending at the Jersey shore are under necessity to provide themselves with terminal facilities in New York City and Brooklyn. Not only is it to their advantage to do so, but it is to the public interest also. The shippers of New York City and Brooklyn would, in many cases, be compelled to remove their places of business to other points if the transportation facilities afforded them by the lighterage extensions of the rail lines were withdrawn."

The facilities and services of the Jay Street Terminal are therefore used in transportation and the Interstate Commerce Law expressly provides for payment when a shipper furnishes such facilities and services.

The statute provides (Sec. 1, Par. 2).

"The term 'railroad,' as used in this act, shall include all bridges and ferries * * * terminal facilities of every kind * * * all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include * * * all instrumentalities and facilities of shipment or carriage, irre-

spective of ownership or of any contract, express or implied for the use thereof, and all services, in connection with the receipt, delivery, elevation, and transfer in transit * * * and it shall be the duty of every carrier * * * to provide and furnish such transportation."

In paragraph 3 of section 15 the Statute provides :

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

The Peavey elevator cases are submitted to be conclusive on this point.

Peavey vs. U. P. R. Co., 176 Fed., 409.
I. C. C. vs. Diffenbaugh, 222 U. S., 42.

Mr. Justice HOLMES delivered the judgment of the Supreme Court, said as follows (222 U. S., 46) :

"The ground on which the payment to owners of grain finally was held to be a rebate had been considered from the beginning and, as we have said, had been brought to the mind of Congress. It is that when the owners of the elevators own the grain put into them, the elevators, they have the opportunity to perform other services to the grain in the way of treatment, or cleaning, clipping, and mixing the grain, which although not included under the term elevation or paid for by the railroad, it is an advantage to them to be able to perform at the same time. This advantage is

thought to create an undue preference and unjust discrimination. Of course the opportunities for fraud are adverted to, but the ground of the decision is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain. As was pointed out by the Court below the final order is confined to grain that has been treated, weighed, inspected, or mixed.

"We agree with the Court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be pronounced under, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in *Penn Refining Co. v. Western New York and Pennsylvania R. R. Co.*, 208 U. S., 208, 221. The law does not attempt to equalize fortunes, opportunities or ability. On the contrary, the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in section 15, the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, Secs. 12, 36, Stat. 539, 551). As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable, and it is admitted that three-quarters of a cent barely would pay the cost of the service rendered without any reasonable profit to Peavey & Co. for the work" (See *Interstate Commerce Commission vs. Stickney*, 215 U. S., 98).

In the case at bar there can be no question that the payments to Jay Street Terminal are reasonable (Petition, fol. 9; Report, fol. 90).

There is nothing modifying the doctrine of the Peavey case in the later Updike case.

U. P. R. Co. vs. Updike Grain Co., 222; U. S., 215.

The first headnote to this case, is as follows :

Interstate Commerce Commission v. Diffenbaugh, end p. 42 followed to the effect that under the Interstate Commerce Law as amended by the Act of June 29, 1906, c. 3591, 34 Stat., 584, 590, elevation of grain is included in transportation and subject to the power of the Commission to determine the reasonableness of the payments to carriers and compensate owners of grain in transit for elevation rendered in connection therewith.

A later headnote is as follows :

A carrier must treat all alike. It cannot pay one shipper for service rendered to his goods in transit, and, by another arbitrary rule, deprive another shipper rendering similar services, of compensation therefor.

I have endeavored to show that the services offered to the carriers by the Federal Sugar Refining Company differed from the services rendered by the Jay Street Terminal, and that the former are not services during transportation but are accessorial thereto.

POINT FIVE.

Arbuckle sugar begins its interstate journey in Brooklyn at the Jay Street Terminal.

The petitions of the carriers and of the Terminal so allege (fol. 5 and 156). The Terminal's petition further alleged that

that any contrary finding is wholly unsupported by evidence (fol. 170).

The judges of the Commerce Court were unanimous on this point (Opin., p. 118, fol. 217; p. 119, fol. 221).

Judge MACK in his dissenting opinion wrote (fol. 221): "The Commission in its report does not clearly indicate whether it deems the transportation of the Arbuckle sugar to begin in New York or in Jersey City."

I submit that while the Commission were "inclined to think" the Jay Street Terminal service accessorial the decision was made upon the finding that Arbuckle sugar is received by the railroads at Brooklyn.

The Report states (Record, p. 52): "The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. *We incline to think this a sound view of the matter upon the facts shown of record.*"

And after a statement that Messrs. Arbuckle and Jamison have physical possession of their sugar from Brooklyn to Jersey City the report continues: "Much therefore may be said in support of the theory that at that point and at that moment is the relation of shipper and carrier between the defendants and Arbuckle Brothers actually established, and that only at that moment of time do the mutual liabilities and responsibilities attending that relation spring into being."

The report continues (Rec., fol. 97): "So far as the general shipping public is concerned, the Arbuckle dock may doubtless now be regarded as a public receiving station of the defendants. But if, for the reasons stated, it is not entitled to be regarded as a public receiving station so far as the complainant and its sugar are concerned, may it be regarded as any other than the private dock of Arbuckle Brothers when they, as shippers, and their own sugar are concerned? If it is operated under conditions that prevent it from being a legal

receiving station for all shippers of sugar might care to use it, we do not see how it may fairly be regarded as a public receiving station of the defendants for the sugar of Arbuckle Brothers. *We have therefore been inclined, as heretofore stated, to regard the lighterage of their own sugar across the river as an accessorial service by Arbuckle Brothers from their private dock, and not as a service of transportation from a public receiving station of the defendants.*"

I have argued that it is unlawful for a carrier to pay a shipper for a service accessorial to transportation. If the Commission had decided that the service of the Jay Street Terminal in respect of Arbuckle sugar is an accessorial service it would have forbidden further payments. It would not have made its order permitting unlawful payments to Jay Street Terminal on condition that still more flagrantly unlawful payments be made to the Federal Company. The Commission did not intend to perpetuate and extend a practice which it found unlawful.

The Report continues (Record, p. 54):

"It is not necessary, however, to draw a fine distinction between an accessorial service and a service of transportation, as applied to the facts in this case. If the allowances made by the defendant subject the complainant to an undue discrimination, or give Arbuckle Brothers, their competitors, an unjust preference, a wrong is being done that must be redressed by an appropriate order, whether the allowances are paid as for an accessorial service or for a service of transportation. We shall therefore now consider the matter briefly from the latter point of view.

Arbuckle Brothers not only operate their dock for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular stations of the defendant on the west shore. And the defendants insist that the sugar of Arbuckle Brothers, like the general merchandise of other shippers received at their dock, commences to move at that

point; and that when Arbuckle Brothers lighter their own sugar across the river they are simply performing a service of transportation with facilities of their own furnished by them for the purpose. * * *

"We had not regarded section 15 of the act as a warrant to a carrier for making an allowance to one shipper providing a facility and performing a service in the transportation of his own property, while refusing a similar allowance to another shipper providing a similar facility and performing the same service in the transportation of his property. Nor had we understood that a carrier, while giving to one shipper the privilege of providing a facility and performing a service in the transportation of his property, could refuse the same privilege to another shipper and compensate the former while refusing any allowance to the latter. Nor is that the law. Certainly it cannot be the law when the two shippers are competitors in the same line of business and in the same markets. If the defendants accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption."

And again (Record, pp. 58, 59):

"Under every principle of equality embodied in this legislation the defendants must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way. And if under section 15, or under any other provision of the act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation service for the defendants, they must make a like allowance to the other shipper who has done precisely the

same thing. To say that the defendants have made an agent of one shipper to do the lightering for it and have not established that relation with the other serves but to emphasize the discrimination, and seems neither to reach the equity and common justice of the situation, nor to constitute even a superficial compliance with the equality of privilege, service, and rate that the law requires of carriers in their contract with interstate shippers.

"The sugar of the two competing shippers gets into the actual physical possession of the defendants on the Jersey shore under practically similar conditions, and if, as the defendants contend, the Arbuckle sugar commences to move at the Arbuckle Dock, it must be remembered that the defendants also contend that their transportation for the general public also extends to and commences at every other pier and dock within the lighterage limits that they have established. If then, the defendants permit Arbuckle Brothers to furnish the lighterage facilities for their own sugar and perform the lighterage service across the river, and if this is to be regarded as a part of the transportation offered by the defendants under their tariffs, it is difficult to see upon what theory the defendants may defend their refusal to recognize the lighters hired by the complainant as its facilities in performing for the defendants a similar part of the transportation service. It seems to us very clear that the payment of allowances to one of these competing shippers, for a service of transportation alleged to be performed by them for the defendants with their own facilities, creates a present actual and substantial inequality that is unlawful under the act, when similar allowances are refused to the other and competing shipper for an exactly similar service."

I submit, therefore, that the Commission did not decide that the Jay Street Terminal service is an accessorial service but did decide, upon the assumption that the transportation begins in Brooklyn, that the principle of equality requires that Federal Company be paid to *lighter* its sugar and that

two shippers who render identical services must have the same allowance.

The inclination of the Commission to believe that Jay Street Terminal service is accessorial and is not transportation rested upon two grounds:

(a) An assumed offer, never made, by the carriers to receive Federal sugar at Jay Street Terminal.

(b) That possession of Arbuckle sugar and assumption of risks by Jay Street Terminal delayed the liability of the carrier.

The Federal Company never offered sugar to the carriers at the Jay Street Terminal and the railroad companies never offered that terminal to the Federal Company. The petition of the carriers state the fact, as follows (Record, p. 11):

"17. That the Commission erred in its report and order in assuming that your petitioners' offer, to receive shipments of the Federal Sugar Refining Company within lighterage limits, and to lighter the same at their own expense to their terminals on the western shore of New York Harbor, was limited to an offer to receive the same at the Jay Street Terminal. Your petitioners, as above recited, are now and have been ready and willing to receive shipments of the Federal Sugar Refining Company at any point within lighterage limits, whether at a public station or private dock, in accordance with their tariffs on file with the Interstate Commerce Commission."

All of the rail terminals on the Jersey shore lie between the Yonkers refinery and Jay Street Terminal. All along the Hudson River front of Manhattan Island are public stations of the several carriers. It requires a great stretch of a fertile imagination to picture a lighter from Yonkers going around the Battery, at the extreme southern end of Manhattan Island, passing by all the New Jersey rail terminals and those on the Manhattan shore and by the Terminals of the New York Dock

Company, to buffet the tides of the East River to Brooklyn to reach the Jay Street Terminal operated by Messrs. Arbuckle and Jamison, there to unload the lighter only to have the sugar transferred.

The law is clear that when the Jay Street Terminal receives Arbuckle sugar for shipment and issues a bill of lading for and in the name of the railroad company, two results follow :

1. Title to the merchandise changes from the consignor to the consignee.

New York Sales Act, Sec. 127.

Mee vs. McNider, 109 N. Y., 500.

Wilcox Silver Plate Co. vs. Green, 72 N. Y., 17.

Waldron vs. Romaine, 22 N. Y., 368.

Gilbert vs. R. R. Co., 4 Hun (N. Y.), 317.

Williston on Sales, Sec. 278.

2. The railroad journey and responsibility begins. The liability of the carrier in fact begins as soon as it receives the merchandise for carriage, even if bills of lading have not been issued or the journey commenced ; the mere receipt of the goods for immediate transportation inaugurates the liability.

Hutchinson on Carriers, Sec. 89.

L. & L. F. Ins. Co. vs. R., W. & O. R. Co., 144 N. Y., 200.

In that case the shippers, dealers in hay, in accordance with the rule of the defendant unloaded their hay into the defendant's freight house and then loaded it into the defendant's cars for transportation. The defendants failed to furnish sufficient cars so that the hay accumulated. The shipper's agent notified the parties supplying them with hay not to deliver any more as there was not room for it, but the company's agent told him he would find room and had the hay subsequently delivered and stored in an open shed. The hay was lost by fire and it was held that the liability of the defendant was that of common carrier and not of warehouseman.

Merritt vs. Old Colony, &c., R., 11 Allen (Mass.), 82. In that case goods were injured while being loaded into the cars by the shipper.

Bulkley vs. Naumkeag S. C. Co., 24 Howard (U. S.), 386. In that case the master of a vessel agreed to carry cotton from Mobile to Boston. The vessel could not go to the wharf and the master hired a lighterman to carry from the wharf to the vessel. The cotton was lost by explosion of the boilers of the lighter while alongside the ship and in this Court it was held that the vessel was liable for the loss.

(b) The physical possession by the Terminal of Arbuckle sugar consigned to Arbuckle Brothers and its contract assumption of some or all of the risks of carriage do not make the service accessorial and the payment unlawful. Much less does it create a preference or discrimination.

This contention concedes that general merchandise which is from 66 per cent. to 56 per cent. of the total carried comes into the possession of the railroads and is carried at their risk at and from Brooklyn. The relation of Jay Street Terminal to this freight and sugar consigned to Arbuckle Brothers is identical.

The railroad is liable to the consignee and the Terminal insures for account of the railroad and is liable to it.

Judge MACK shows clearly that Arbuckle sugar sold f. o. b. Brooklyn and consigned to the purchaser is as to the railroads possession and liability exactly as general merchandise (Rec., p. 119). He further writes of the sugar consigned to Arbuckle Brothers :

“ As to the comparatively small percentage of shipments of which Arbuckle Brothers are the consignees as well as the consignors, this would seem to be equally true. The title thereto could be transferred by them immediately after the bills of lading are issued, and, in that event, the railroad companies would again clearly be liable as carriers to the assignees, even though the

goods had not yet actually moved from New York. And the retention of title thereto by Arbuckle Brothers during the time that they, acting as agents for the railroad companies, are transporting them to Jersey City under the contract by which they agree to indemnify the railroad companies against their own acts, and thereby to release them, in a sense from the obligations which they would ordinarily incur as common carriers toward the owners of goods carried, would not of itself change the transaction from a transportation service performed by the railroads through their agents, the shippers, into an accessorial service performed by the shippers solely on their own account, payment for which would be illegal, irrespective of any unjust discrimination that might result therefrom."

POINT SIX.

The contracts between the Carriers and Jay Street Terminal do not violate the commodities clause.

This point was made for the first time, before this Court, in the brief of the Solicitor General, on the appeal from the preliminary injunction. It is now in the assignment of errors (Par. XI, p. 127), in an allegation that the Messrs. Arbuckle and Jamison "are not in Court with clean hands, and have no standing in a Court of equity" because they transport sugar manufactured by them and in which they have a direct interest.

The "commodities clause" makes it "unlawful for any railroad to transport" in interstate commerce any commodity which it owns. Jay Street Terminal is not a railroad but one of many freight agents of the seven trunk line railroads. The appellants ask an interpretation of the statute extensive

enough to include these terminal agents of railroads. It would be, we submit, judicial legislation utterly unwarranted. The reason of the law is submitted to be wholly against such an interpretation. It was intended to divorce the power of making railroad rates from the power of making prices for the commodity carried. Jay Street Terminal has absolutely nothing to do with making rates for east or westbound freight. This subject was not considered by the Commission and no fact appears in the report to justify an extension of the statute. The petitions allege that the railroad companies pay Jay Street Terminal and Brooklyn Eastern District Terminal and all other terminal companies in Brooklyn the same rates. All the facts are therefore against the extensive interpretation of the statute which the appellants ask. None of the evils which the clause were intended to cure are present in this case.

The Congress when it considered and enacted the "Commodities Clause" had before it the subject of payment to shippers by railroads and the amendment to section 15 in 1906 was intended to and does cover just such a terminal service by a shipper as is presented by the case now at the bar of this Court.

Peavey & Co. vs. U. P. R. Co., 176 Fed. Rep., 409, opinion, p. 420.

In that case Judge SANBORN wrote :

"In the year 1905, the Commission made this report and recommendation to Congress :

'Terminal roads, elevator charges and private cars. There is an important class of cases in which the owner of the property performs a part of the service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the service. Such performance may take the form of an

excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigators leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. *It has been suggested that Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property.* We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law 'would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the commission should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available.'

Thereupon the Congress amended section 1 of the act so that it provides that transportation shall include 'all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, icing, storing and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor.' 34 Stat. 584. Section 6, so that it provides that the schedules of rates required of the carriers shall 'state separately all terminal charges, storage charges, icing charges all other charges which the commission may

require, all privileges or facilities granted or allowed.' 34 Stat. 586. And section 15, so that it provides:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section" 34 Stat., 590.

"The contract of the Union Pacific Company with Peavey & Co., the decision of the commission thereon in 1904, and the report of the commission in 1905, had informed the Congress, and when these amendments were enacted the members of Congress were aware, of the trade advantages which naturally and necessarily resulted to a shipper from the ownership of cars, elevators, industrial tracks, compresses, and other facilities by which he transports his own property for a carrier and the danger of discrimination and of rebates from an 'excessive division to a terminal road owned by a shipper, the payment of an excessive elevator charge to the owner of the grain and the payment of an excessive mileage upon the private car which conveys the property of the owner of the car'; and in the light of all this knowledge it prescribed the remedy and fixed its limit. It is that the charge and allowance to the owner of the elevator, who is also the shipper of the grain, shall be no more than is just and reasonable, and that the limit of the power of the commission is to determine what is a reasonable charge as to the maximum to be paid by the carrier for the service. Counsel argued that this view ignores the power vested in the Commission."

The decree in that case was affirmed in this Court.

I. C. C. vs. Diffenbaugh, 222 U. S., 42.

The judgment of Mr. Justice HOLMES is quoted in another point.

This Court has held that the commodities clause does not cover such as have been sold by the carrier before shipment.

U. S. vs. R. Co., 213 U. S., 366.

Eighty per cent. of the Arbuckle sugar is sold before shipment and title vests in the consignees when Arbuckle Brothers deliver the sugar to Jay Street Terminal. The order covers all sugars shipped from Jay Street Terminal. The only lawful order, if the argument of the appellants prevail, would be to forbid Jay Street Terminal to handle sugars consigned to Arbuckle Brothers.

POINT SEVEN.

Of the origin of the compensation to Jay Street Terminal and the amount of it.

Judge MACK concluded his dissenting opinion thus (Rec. 123) :

"The fact that the contracts between the Jay Street Terminal and the railroads, by which the Arbuckle private docks were made public terminal stations and these allowances were definitely fixed, were made during the session of Congress which enacted the Hepburn Act, a law which aimed more effectively to prevent certain illegal practices theretofore secretly indulged in for the benefit of large and favored shippers, and the further fact that the ultimate destination of the goods determined the rate of payment, although the services in each case were absolutely identical, lends support to

the conclusions of the commission that the allowances are a mere disguise to conceal unjustly discriminatory and therefore illegal payments."

In the Report of the Commission, it is stated that (Rec. 48):

"Havemeyer and Elder, predecessors of the American Sugar Refining Company, the dock of which is also involved in this proceeding, for many years enjoyed an illegal preference at the hands of the carriers. It is also our understanding that when Arbuckle Brothers began to compete with the Havemeyer refineries these allowances were extended to them, apparently under some sort of verbal arrangement. * * * The allowances at both piers seem therefore to have had their origin in an unlawful preference to these great shippers. It was not until after the regulating body had been strengthened by additional legislation that the two docks seem to have been designated in the published tariffs of the defendants as railway terminals and were thus made to subserve the convenience of such of the general shipping public in Brooklyn as might be able to use them" (Rec. 49).

"These dock properties may make convenient terminals for a substantial amount of general traffic, but it is somewhat singular that with the entire Brooklyn front available, and much of it equally convenient, the two docks, one directly owned by Arbuckle Brothers and the other by persons having supposedly very close relations with the American Sugar Refining Company, apparently the only sugar refiners now in operation in Brooklyn should have been selected for railroad terminals."

"The explanation lies undoubtedly in the fact that sugar moves westbound from New York City in larger volumes probably than any other commodity. * * * It is a traffic that the defendants ought to be prepared to receive and handle with their own facilities. But instead of acquiring or renting these or similar dock properties and operating them as terminals with their own employes they have contracted for their operation

by these great shippers and interests that are closely allied with great shippers. * * * It is impossible to conclude from all the information before us that these continued relations between the defendant carriers and great shippers and interests closely allied and largely identified with great shippers, are wholly disinterested, however much of a convenience the docks may now be to some of the general shipping public."

It is not claimed by Jay Street Terminal that the contract is "wholly disinterested" on either side. Beyond doubt, self-interest prompted each party. If the payment to Havemeyer and Elder was an illegal preference, was it or not changed when Arbuckle Brothers operating the only other refinery in Brooklyn, received the same allowance? If not, upon what basis does the order stand which extends to the Federal Company the compensation now paid to Jay Street Terminal and which the Government denounces as an illegal preference? The argument of the learned Commissioner who wrote the Report loses more than half its force from this concession made at the conclusion of the Report (Rec. p. 60).

"The complainant also charges that a similar allowance paid to the owners of the so-called Brooklyn Eastern District Terminal, owned by Havemeyer interests, also subjects it to undue prejudice and disadvantage. It is at this dock that the output of the American Sugar Refining Company is largely handled. But although our understanding had been to the contrary we were told at the hearing that the Havemeyers owned only an insignificant amount of the capital stock of that company. Accepting these statements at their face value, we need not at this time consider that phase of the complaint."

It can be freely admitted, however, that at least from and after the passage of the Elkins Act the payments to refiners for lightering their sugar to the rail terminals of the trunk line railroad were illegal because they were paid for accessorial

services. We have seen that the Commission in its Report of 1905 recommended legislation that would permit shippers to own terminal railroads and to contract with the trunk line railroads to carry their own property by services and instrumentalities of transportation. To guard against preferences and discriminations the Commission asked power to limit the compensation of the shipper to a reasonable amount (See Opinion SANBORN, J., *ante*, p. 45).

There can be no doubt of the benefits to the public at Jay Street Terminal. In 1907 two-thirds of the traffic was general merchandise. In 1910, fifty-six per cent. was general merchandise and amounted to 343,280 long tons.

Arbuckle Brothers were certainly not blameworthy for entering into competition with the American Sugar Refining Company, the colossus of the trade. A recent report of a Congressional investigating committee showed that the competition with Arbuckle Brothers cost the American Company millions of dollars and reduced the refiner's margin to a fraction of a cent a pound. Messrs. Arbuckle and Jamison are scarcely to be blamed and it is not understood that the Commission blame them for asking to have their rates equalized with those paid to the railroads by the American Company. If the payments to the American Company and to Arbuckle Brothers for carrying exclusively their own produce were illegal, the order of the Commission in this case is beyond its power. Let it be assumed that such payments to the Brooklyn refiners for carrying their own sugar were, as the Commission finds, a preference and, therefore, illegal. The learned counsel for the Federal Company conceded in the Court below that Messrs. Arbuckle and Jamison had the legal right to discontinue illegal practices and to make a contract permitted by the law. In the argument before the Commerce Court, Mr. Bigelow answered Judge MACK as follows (Oral argument, p. 13) :

“ JUDGE MACK : Taking this view, Mr. Bigelow, after the Elkins Bill passed, Arbuckle Brothers, in order to

retain the benefits they had before, decided to pursue a lawful business, to establish a public terminal and incorporated it as such. They own the entire capital stock and do a public terminal business. Say they did 90% outside and only 10% of their own, and they continued to do the same amount of business in sugar and the other traffic constituted 90%. Have they not a perfect legal right to conduct such a business? Does the fact that it is 44% make a difference, or the fact that they did not incorporate or retain the same co-partnership?

MR. BIGELOW: I take it, your Honor, the difference comes in the way they incorporated, and with the carriers refusing to allow us to do the same thing.

JUDGE MACK: The question that I ask is this: What is to prohibit Arbuckle Brothers from going into the public terminal business, even though a large part of that business consists of carrying his own goods?

MR. BIGELOW: Nothing, your Honor, there is nothing to prevent his going in and carrying 90% of his own goods through that terminal. That is not the point. The point is to allow them to receive their own goods and receive pay, is a discrimination if the same privilege is refused to his competitor.

JUDGE MACK: It is not refused to his competitor. Every manufacturer can establish a public dock and then if he is refused the same privilege it will be a question whether he is discriminated against.

MR. BIGELOW: Under the circumstances in the case here it would be a discrimination.

JUDGE MACK: But, Mr. Bigelow, if this was a public terminal, and was not in fact the property of the Arbuckle Brothers?

MR. BIGELOW: It is because of the fact that other people take their freight there that the operation is illegal.

JUDGE MACK: It is because the character of the transaction assumes a different practical view and legal form when other people as well as Arbuckle Brothers use it?"

In the brief submitted for the Federal Sugar Refining Company upon this appeal Mr. Bigelow in his third point deals with its expedient of re-billing at pier 24. He states (p. 27) :

"The plan was adopted in order to meet the views of the Commissioner who had cast the deciding vote against the Company in the case as first submitted."

Mr. Bigelow also states (p. 28) :

"As to the propriety of its motives, the Federal Company conceives that it is entitled to accommodate its conduct to settled principles of law, even though it be impelled thereto by an enlightened self-interest."

Surely, the Messrs. Arbuckle and Jamison have the same right to accommodate their conduct to settled principles of law.

(b) Judge MACK's inference unfavorable to the Jay Street Terminal rested partly on "the further fact that the ultimate destination of the goods determined the rate of payment, although the services in each case were absolutely identical."

Jay Street Terminal is paid three cents when the trunk line railroads terminating at New York perform the whole carriage, and four and one-fifth cents when connecting carriers join in the carriage. The reason is plain. There is only one carrier to pay the three cents and two or more carriers join to pay a higher freight rate into which the $4\frac{1}{5}$ cents is absorbed. The rates were fixed before Jay Street Terminal was established. They are the same to the half dozen terminals in Brooklyn and Jay Street Terminal is the only one which carries merchandise belonging to the terminal proprietors. The proprietors are not concerned with the rate for any particular merchandise or carload, but with their total receipts in the course of the year and their total expenditures. The 3 cents and $4\frac{1}{5}$ cents has been conceded at every

point of this litigation to be a reasonable compensation and in the briefs in this Court upon the former appeal it was expressly stated that neither the United States nor the Federal Company questioned the reasonableness of the rate. The conceded fact is that the Jay Street Terminal yields less than three per cent. upon the capital invested and this without any salaries to the partners and without any allowance for interest or depreciation.

POINT EIGHT.

It is therefore respectfully submitted that the decree of the United States Commerce Court should be affirmed.

WILLIAM N. DYKMAN,
for Arbuckle Bros. and Jay Street Terminal.

MAPS

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U.S. DISTRICT COURT, N. D. N. Y.
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JAMES H. MCKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912

THE UNITED STATES INTERSTATE COM-
MERCE COMMISSION AND FEDERAL
SUGAR REFINING COMPANY,

Appellants,

vs.

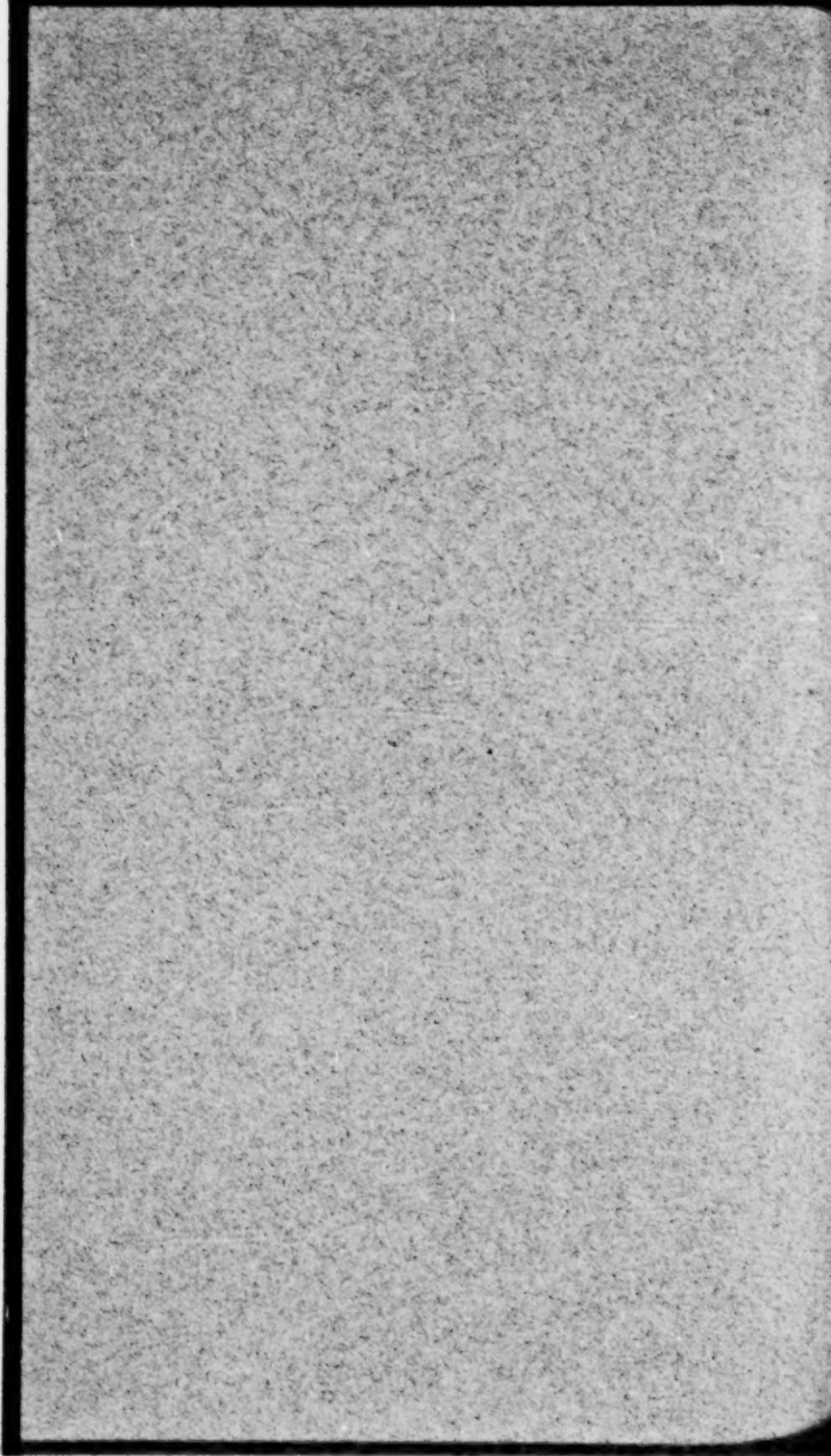
No. 285

THE BALTIMORE & OHIO R. R. CO. *et al.*,
Appellees.

**BRIEF FOR BROOKLYN EASTERN
DISTRICT TERMINAL, APPELLEE**

H. B. CLOSSON,

*Of Counsel for BROOKLYN EASTERN
DISTRICT TERMINAL.*



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, INTER-
STATE COMMERCE COMMISSION
AND FEDERAL SUGAR REFIN-
ING COMPANY,

Appellants,

vs.

BALTIMORE & OHIO R. R. CO.,
et al.,

Appellees.

No. 862.

**BRIEF FOR BROOKLYN EASTERN
DISTRICT TERMINAL, APPELLEE.**

The Brooklyn Eastern District Terminal is a transportation corporation organized under the laws of the State of New York. It was not a party of record, though a party in interest, to the proceeding before the Interstate Commerce Commission. In the Commerce Court it was upon its petition (pp.70-83), allowed to intervene as a party Complainant.

Answers originally interposed by the United States and the Federal Sugar Refining Company to this petition were subsequently withdrawn (p. 103) and motions to dismiss entered (p. 104).

All of the allegations of fact made in the intervening petition of the Brooklyn Eastern District Terminal stand therefore admitted. They may be summarized as follows:

Facts.

Although the main terminal of the Brooklyn Eastern District Terminal (hereafter referred to as the B. E. D. Terminal) is situated within a block of the large Brooklyn Refinery of the American Sugar Refining Company, and naturally, therefore, handles much of its traffic, there is no community of interest or ownership whatever between the two Companies. The American Sugar Refining Company has no interest whatever in the B. E. D. Terminal, all of whose stock is owned by five members of the Havemeyer family. None of them have any interest in or connection with the American Sugar Refining Company (p. 71).

The B. E. D. Terminal for many years has maintained and operates in Brooklyn, New York, on the East River, between North Third and North Tenth Streets, an extensive railroad terminal; which has been designated in the tariffs of the petitioning railroads herein, except the Pennsylvania Railroad, and is used by it and three other railroads, and eighteen steamship lines, engaged in the transportation of freight to and from New York Harbor, as a receiving and delivery station for their freight. A descriptive map of this terminal property is appended to this brief.

It has trackage facilities, where cars can be handled to and from floats and contents forwarded or delivered from track, in full carloads; and a covered pier where package freight is handled directly between the cars and pier. The terminal is equipped with all modern appliances for the convenient and prompt handling of freight of all kinds. The yards for the delivery of track freight have paved roadways without grade, and a capacity for several hundred cars. There is also a yard for the accommodation of livestock, grain elevators of 500,000 bushels capacity, a hay warehouse in which

hay can be inspected, sold or stored; one crane of twenty tons capacity, and 2 cranes of 10 tons capacity each, and other special facilities for the handling of heavy freight, such as machinery, structural material, &c. (p. 72).

The present value of the plant and equipment of this terminal alone is substantially as follows (p. 72) :

Real Estate	\$5,288,360.00
Building and Construction	435,869.53
4 Tugs	137,146.70
13 Floats	258,987.98
13 Lighters	79,377.72
9 Locomotives	49,659.66
Franchises	14,000.00

	\$6,263,401.59

Upon this investment of \$6,263,401.59 the net earnings during the year 1910 were \$321,555.12, or 5.13 per cent., all derived from payments made to it by the Railroads under their published tariffs of the terminal charge, for each 100 pounds of freight transported between the terminal and the termini of such railroads in New York Harbor, of 4 1/5 cents per 100 pounds on freight moving to or from the western termini of the trunk lines and points beyond, and 3 cents per 100 pounds on other freight (p. 72).

During the year 1910 the total freight transported by the Terminal was 2,796,263,006 pounds. Of this total, 31.04 per cent. was sugar, and 68.96 per cent. was miscellaneous merchandise. Of this total tonnage, 53.74 per cent. was eastbound and 46.26 per cent. westbound. It was received from or delivered to not less than 1,650 separate customers.

The maintenance and operation of the terminal is a commercial necessity for the large and busy districts of Brooklyn and Jersey City which it serves,

and is rendered possible only by the fact that as a union terminal for substantially all the railroads and steamship lines in the Harbor, it is able to amalgamate their eastbound and westbound business, so that it handles each way approximately the same amount of traffic, and is thus enabled to earn the very moderate return of 5.13 per cent. upon its investment. No such result could be accomplished by any terminal handling the traffic of one railroad or steamship line alone. (p. 73).

The B. E. D. Terminal, and the Jay St. Terminal are in effect union receiving and delivery yards of the railroads, located at convenient points along the water front of New York Harbor. They afford a means whereby the freight shipped from or consigned to the district served by the terminal can be assembled at and delivered from a point conveniently near its origin or destination:—[the fact that sugar “constitutes almost one-third of all the traffic moving westward (p. 50) is a simple economic explanation of the supposedly sinister proximity of the terminals to the sugar refineries]; and there loaded into or unloaded from the through cars in which its continuous carriage has been or is to be performed without breaking bulk (p. 76).

Each such terminal involves the devotion to its use of large areas of expensive real estate and the maintenance of the extensive equipment heretofore described, including locomotives and tugs, and floats each capable of receiving from, transporting and delivering upon the railroad tracks from twelve to twenty loaded freight cars (p. 76).

On the other hand, lighterage service alone such as is performed by or for the Federal Sugar Refining Company, as distinguished from a terminal and car floatage service, is performed by small lighters, representing each an investment of not more than \$7,000, a fleet of from two to four of which can be towed by a tug hired for the purpose at an expense

of \$7.50 per hour. For such simple lighterage service when not performed in connection with the maintenance of a terminal, a compensation of 3 cents per 100 pounds is adequate (p. 77). It is the prevailing rate in New York Harbor; and is the actual cost to the Federal Sugar Refining Company of the service now performed by it in lighterage its sugar from its refinery at Yonkers to the termini of the railroads. The Federal Company handles only its own product and maintains no terminal station, tracks, floats, lighters, tugs or other real estate or equipment of a terminal station (p. 75).

Nevertheless, under the terms of the order of the Commission, unless the Railroads should take the alternative of violating their contract with the Jay Street Terminal and crippling, if not destroying, it by depriving it of the revenue which now maintains it, the Federal Sugar Refining Company must hereafter be paid by the Railroads on all its sugar bound for points beyond the western termini 4 1/5 cents, and on the rest, 3 cents per 100 pounds; although the Federal Company would lighter it all at an expense to itself of only 3 cents per 100 pounds (p. 75), and can now have it lightered for nothing, at the expense of the Railroads, from any point within the lighterage limits (p. 3).

Argument.

With great respect it is submitted that if the contention of the appellants appears in any way plausible, such plausibility is attained only by persistently ignoring certain basic facts; all of which are nevertheless admitted:

1. "Lightering," which is the only service tendered by the Federal Company, is one thing. The maintenance of a "terminal" and "terminal service" is another and vastly and more expensive thing, involving the maintenance and operation of

freight yards, warehouses, railroad tracks, locomotives, tugs and car floats. Yet the order of the Commission ranks them as equal, and orders the same compensation paid for both.

2. No "allowance for lightering" is now paid by the railroads to any shipper. One of their terminal stations is owned by a shipper and is hired from him at a concededly reasonable compensation, measured for convenience by the amount of the freight from all sources received from and delivered to it; the same compensation which is paid to all the other railroad terminal stations, including that of the Brooklyn Eastern District Terminal, admitted to be wholly independent of any shipper.

3. The 3 cents and the $4\frac{1}{5}$ cents paid to the Jay Street Terminal, to the Brooklyn Eastern District Terminal and to the other terminals, is not the compensation they receive for "lightering." Out of the 3 cents and the $4\frac{1}{5}$ cents must come the cost, not only of the lightering or floatage, but the cost of the maintenance and operation of the terminal plant itself. This represents, in the case of the Jay Street Terminal, an investment of \$2,000,000 (page 86), in the case of the Brooklyn Eastern District Terminal an investment of \$6,000,000 (page 72); in the case of the Federal Company, of *nothing*. For lighterage therefore the terminal companies receive not 3 cents nor $4\frac{1}{5}$ cents, but possibly $1\frac{1}{2}$ or 2 cents. Under the order of the Commission the Federal Company would receive 3 cents and $4\frac{1}{5}$ cents.

4. Not until the Federal Company shall offer to establish a public terminal station in some vicinity within the lighterage limits not now adequately served, and the railroads shall refuse to pay it the 3 and $4\frac{1}{5}$ cents upon the business it provides,

can it complain of discrimination against it by the railroads in favor of any of the existing terminals. That the case for the appellants does depend upon the persistent ignoring of these facts, appears not only in their briefs, but in what may be taken to be at least the most dispassionate presentation of it; the dissenting opinion of Judge Mack in the Court below.

The learned Judge says (p. 121):

"When, as here, the complaint is based on the grant to the one and the denial to the other of the privileges, not of free lighterage but of itself performing for compensation the transportation service from within the lighterage limits to Jersey City, it is no answer to assert that at present the situation of the two parties is not similar, transportation for the one beginning at New York and for the other at Jersey City."

That, however, is not the answer to the complaint stated. The answer to it is that the assumption on which "the complaint is based," is at variance with the facts. The privilege which has been granted to Arbuckle has not been denied to the Federal Company; and it is not the privilege of performing his own transportation service to Jersey City. That, it may be assumed, would be denied to Arbuckle, as it has been so far to every shipper. The privilege granted to Arbuckle is the privilege of maintaining a terminal costing some \$2,000,000 for the reception of freight from every shipper in that district of Brooklyn as well as himself, and the transportation of this freight, under railroad bills of lading, to Jersey City. That is a privilege which in the nature of things cannot be granted to every shipper, but only to those willing and able to go to the expense of establishing a public terminal in a district now without one, within the lighterage limits. And it is a privilege which the

Federal Company has as yet given no sign of desiring.

Again, the learned Judge says that the demand of the Federal Company is this:

"Our sugar is at pier 24; it is already loaded in lighters, we want bills of lading for the through transportation from this point, and we demand, for similar compensation, the privilege of performing a part of the transportation service, that between the lighterage point, Pier 24, and Jersey City, a privilege substantially similar to that which you grant Arbuckle Bros."

But Arbuckle Bros. perform a great public service, at great expense. The Federal Company performs no public service at all; and out of its desired private service would make a clean profit for itself of 1 1/5 cents on every pound of sugar destined for points beyond the Western termini, besides getting its lighterage from Yonkers to Pier 24 for nothing. If the two "privileges" are "substantially similar," so are 2 and 4.

Furthermore, the Federal Company at Pier 24 is certainly in no better position to demand this "privilege" than every other private shipper at every other private pier in New York Harbor. If it must be granted to one, it must be granted to all. Every shipper must be authorized to issue his own bills of lading and lighter his own merchandise from every pier in the harbor to the congested terminus of the railroad at Jersey City,—until the Arbuckles can either dispose of their refinery or induce some capitalist with no interest in any merchandise to be shipped and content with 3% upon his money, to take their terminal off their hands and operate it for the sake of the public whom it serves.

POINTS.

1. The maintenance by the Railroads of public receiving and delivery stations to which cars may be transported on their own wheels, such as the Brooklyn Eastern District Terminal and the Jay St. Terminal, located at points on Long Island convenient to the origin and destination of the freight to be carried, and the payment of the compensation necessary to procure the maintenance of such stations and the transportation of such cars to and from them, is a lawful and necessary service performed by the railroads. The Interstate Commerce Commission has not the power to require the railroads, as a condition of being permitted to maintain and operate such terminals, to pay lighterage allowances to individual shippers who elect instead to deliver their own freight to the railroad termini in New Jersey and on Staten Island. By the order in question the Commission has assumed to exercise such power.
2. The maintenance of such public terminals for handling cars on their own wheels is not a like service to lighter the freight of individual shippers from their private docks to the railroad termini; and the railroads may pay to such terminals the expense of the public service, and refuse to pay to such shippers the expense of the private service, without thereby being guilty of any discrimination. The order in question of the Commission is based upon the proposition that the railroads in so doing are guilty of unjust discrimination.
3. The railroads may under the law maintain public receiving and delivery stations, such as the

Brooklyn Eastern District Terminal and the Jay St. Terminal, at convenient points, without thereby incurring any obligation to pay shippers, located at points remote from such stations, the expense of the cartage or lighterage of their merchandise from their factories to any of such stations or to another station. The order of the Commission imposes upon the railroads such obligation, as a condition of being allowed to maintain such public stations.

4. The railroads, having established through routes and joint rates to their several stations on Long Island, those of the Jay St. and B. E. D. Terminal among the number, cannot be required under the law to pay to individual shippers on Long Island who elect to deliver their freight instead at an intermediate point in such through route, the cost to such shippers of such delivery to such intermediate point. Under the order of the Commission the railroads would be required to make such payments.

5. The just and reasonable charge and allowance, according to the findings of the Commission itself, for the sole service of lighterage sugar, when the expense of maintaining a public terminal station is not involved in the service, from the refineries in New York Harbor, and from the Federal Sugar Refining Company in Yonkers, to the railroad termini in New Jersey and on Staten Island, and the actual cost to the refineries of such lighterage, is three cents per 100 pounds. The order of the Commission requires the railroads to pay to such refineries on all sugars so lightered bound for points beyond the western termini, $4\frac{1}{5}$ cents per 100

pounds, to wit, 1-1/5 cents per 100 pounds in excess of a just and reasonable allowance. The Commission has no such power.

6. The Commerce Court was not asked by the Bill or the intervening petitions to set aside any finding of fact made by the Interstate Commerce Commission, but to determine whether upon the undisputed facts the Commission had the power to make the order it did. As the Commerce Court correctly determined that the Commission had no such power, it had jurisdiction to set the order aside.

The contention of the respondent appears to be that though all the facts upon which the Commission acts are undisputed, its finding that an undue preference exists is in every case a finding of fact which no Court can review, and which therefore ends the controversy.

This is certainly not the law. The *Peavey Case* (*Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S., 42) so holds. In that case the report of the Commission contained the express finding that the advantages given to Peavey & Co. constituted "*an undue and unlawful preference*" (14 I. C. C. Repts., 315, 316). Nevertheless this Court affirmed the decree of the Circuit Court granting an injunction against the enforcement of the order of the Commission.

The decree of the Commerce Court should be affirmed.

H. B. CLOSSON,
Of Counsel for Brooklyn Eastern District
Terminal Appellee.

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No. ~~885~~

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

UNITED STATES, INTERSTATE COMMERCE COMMISSION
AND FEDERAL SUGAR REFINING COMPANY,

Appellants,

vs.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.,

Appellees.

**REPLY BRIEF OF APPELLEES TO GOVERNMENT'S
BRIEF.**

GEO. F. BROWNELL,

Solicitor for Railroad Companies.

WILLIAM N. DYKMAN,

Solicitor for Arbuckle and Jamison.

H. B. CLOSSON,

*Solicitor for Brooklyn Eastern
District Terminal.*

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, INTERSTATE
COMMERCE COMMISSION AND
FEDERAL SUGAR REFINING COM-
PANY,

Appellants,

vs.

THE BALTIMORE AND OHIO RAIL-
ROAD COMPANY, *et al.*,

Appellees.

No. 862.

**REPLY BRIEF OF APPELLEES TO GOV-
ERNMENT'S BRIEF.**

The Government's brief was not served until the day this appeal was argued and, therefore, opportunity was sought to file a reply brief in answer to the novel argument advanced therein.

It is the Government's contention that Arbuckle and Jamison perform a lineal part of the interstate transportation, that they are therefore an integral part of the through trunk line systems operating into Greater New York, and consequently a common carrier by railroad and a railroad company within the meaning of the so-called "commodities clause." It is then urged that if Arbuckle and Jamison are

a railroad company, the order of the Commission was correct, in so far as it ordered the railroads to cease and desist from the payment of allowances to Arbuckle and Jamison on their sugar even though such command was effective only so long as no payments were made to the Federal Sugar Refining Company and that whether proper or not the order should not have been enjoined because the railroads and Arbuckle and Jamison had no rights in the Commerce Court, because of the equitable maxim that "He who comes into equity must do so with clean hands."

POINT 1.

The Jay Street Terminal is not a common carrier by railroad, nor subject to the Act to Regulate Commerce.

The Jay Street Terminal is owned by a co-partnership and is operated under contract as a freight station for the railroad companies, appellees (Rec., p. 4).

It does not hold itself out as a common carrier to the public; it does not deal with the shipping public, except as the agent of the railroad companies which have employed it to act as their contractor in performing certain of the transportation services which they have obligated themselves to perform by virtue of their filed and published tariffs which, in effect, extend their lines from their rail termini on the western shore of the Hudson River to all points within the so-called "lighterage limits."

It has never been alleged or argued by the railroad companies or Arbuckle and Jamison, as stated by the Govern-

ment, that Arbuckle and Jamison are engaged in the various transportation services set forth on pp. 12, 13 and 14 of the Government's brief. The allegation and argument has ever been that the Jay Street Terminal, or adopting the appellation of the Government, Arbuckle Bros., are the agents or contractors of the railroad companies and that the services are performed for the public by the railroad companies.

The petition of the railroads (Arbuckle and Jamison's petition is substantially the same) states "that the railroad companies maintain freight terminal stations at various points in the Boroughs of Manhattan and Brooklyn" (Rec., p. 3, fol. 4), and that "Your petitioners (the railroad companies) transport between said terminal stations, piers, docks and landings and their rail stations on the western shore of New York Harbor, as a part of the transportation service from the point of shipment to the points of destination * * * freight received at or destined to said terminal station. * * * Your petitioners (the railroad companies) for several years past have held and now hold themselves out as common carriers to and from all said points. * * * The liability under their (the railroad companies) respective bills of lading attaches to your petitioners (the railroad companies) on westbound shipments from the time the freight is received at such terminal station. * * * The bill of lading issued by your petitioners (the railroad companies) for freight so received or delivered by them by its terms covers and includes the lighterage movement. * * * The Jay Street Terminal is a union freight terminal for all your petitioners and is designated as the regular public freight terminal of your petitioners in their tariffs duly filed. * * * Under and pursuant to said con-

tracts the Jay Street Terminal acts as agent of your petitioners. * * * In consideration of these services each of your petitioners (the railroad companies) has agreed to pay its said agent, the Jay Street Terminal, the compensation which is arrived at as follows" (Rec., pp. 4 and 5). These allegations standing admitted, the common carrier and the only common carrier is the railroad company whose bill of lading is issued to the shipper.

Counsel for the Government is in error in stating on page six of his brief "joint published tariffs are issued by the railroads and Arbuckle Bros., thus establishing the fact that Arbuckle Bros. are common carriers doing an interstate railroad business (as otherwise they would not issue tariffs, etc.)," and on page thirteen "and publish joint tariffs with the railroad companies."

This Terminal does not concur in the tariffs issued by the railroad companies which employ it as their agent, nor are joint tariffs filed on behalf of it and of the railroad companies. It is simply shown in the tariffs of the railroad companies as one of their stations, in the same way as Duane Street is shown as a station of the Erie Railroad in New York City.

It is true that the contracts of this Terminal with the railroad companies contain a provision in which the phrase "the joint published tariffs of itself and the railroad company," appears (Rec., p. 17). But no such joint published tariffs have ever been issued and this Terminal issues no tariffs of any kind, and for the very good reason that it is not a common carrier, either by railroad or in any other way, nor does it hold itself out in such a capacity to the public. The tariffs showing the services performed by this Terminal, the facilities provided for the shipping public, are published by the railroad companies which are

the common carriers from this Terminal, and there is no necessity for the Terminal, which is simply a private contractor, publishing tariffs or joining in such tariffs, although it might do so if it desired and possibly it was assumed that it would when the contract was drawn.

This position has the sanction of the Interstate Commerce Commission. In its Conference Rulings, Bulletin No. 5, Ruling 180, the Commission said "For operating purposes only a carrier leased twenty miles of its line to another railroad company. The contract required the lessee, for an agreed compensation to be paid to it by the lessor, to operate the lessor's trains and to maintain its way, tracks and appurtenances, the rates and charges to be collected by the lessor and the lessee to have no direct dealings with the public. On the facts as stated in the inquiry: *Held*, that the lessor must publish the rates, fares, and charges, and the lessee need not be a party to the tariffs nor concur therein, but is simply a contractor performing certain services for the lessor."

The Government relies upon the case of the United States vs. Union Stock Yard, 226 U. S., 286, to sustain its contention that the Jay Street Terminal is a common carrier and subject to the Interstate Commerce Act. In that case both the Chicago Junction Railway Company and the Union Stock Yard and Transit Company were held to be common carriers subject to the Act to Regulate Commerce with respect to the filing of tariffs. Both of these companies were Illinois corporations. The Stock Yard Company by its charter was authorized not only to maintain stock yards, but also to construct and maintain a railroad, and by its charter it was made a common carrier and its rates were made subject to the general railroad law of Illinois. The Chicago Junction Railway Company, which

operated the railroad of the Stock Yard Company under lease, was by its charter made a common carrier by railroad, as was said in the opinion of this Court. The Junction Company published tariffs showing the charges which it exacted for its service, such tariffs being in general circulation about Chicago, especially in the stock yards district, though they were not filed with the Interstate Commerce Commission.

After the lease to the Junction Company the two companies together performed the same services which were originally performed by the Stock Yard Company, and certain of the services which were still performed by the Stock Yard Company, for example, the loading and unloading and feeding and watering of live stock in interstate transportation, are clearly services which railroads hold themselves out to perform, and which they are by law required to perform. The Stock Yard Company received under the lease two-thirds of the profits received by the Junction Company for performing the rail transportation service. In other words the character of the services performed by these two companies were so closely connected and their inter-corporate relation such that this Court considered them practically as one and the same following its former holding in the case of *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S., 498.

The decision of this Court in the Union Stock Yards case *supra*, is not apposite for as was said in the opinion in that case referring to the Junction Company and the Stock Yard Company "*they are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity and because they are so treated by the great railroad systems which use them.*" It is submitted that these are the

only ways in which a common carrier can become such, viz., either by charter obligation or by holding itself out to the public.

The Jay Street Terminal, of course, cannot be made a common carrier by the terms of its charter for it has none. It is a co-partnership and not a corporation. No obligations of a public service character have been placed upon it by the law of the State of New York, nor has it received from that State the franchises which are granted to a public service corporation as the power of condemnation, the power to cross public streets and highways. In this respect the situation is different from that of the Stock Yard Company which, under the special charter granted to it by the State of Illinois, received such franchises and privileges.

The Jay Street Terminal again has not held itself out as a common carrier to the public and has never treated with the public, except as the agent of these railroad companies. It publishes no tariffs showing its charges, either tariffs filed with the Commission or otherwise, as did the Junction Company. It has no charges of its own to publish, so far as the public is concerned. It is not treated as a common carrier by the railroad companies but solely and simply as their agent to perform a certain portion of their services for them, such services being specifically described and designated in contracts between each one of the railroad companies and the Jay Street Terminal.

Nor is this case an authority to show that the Jay Street Terminal is a railroad. For there the Stock Yards Company was a corporation empowered to construct a railroad, which it constructed and operated for years, and then simply entered into a partnership arrangement with another railroad corporation, the Junction Company, by virtue of

which the Junction Company operated the railroad end of the business and the Stock Yard Company carried on the other part of the business for which it was incorporated. By this arrangement it was held that the Stock Yard Company did not exempt itself from the operation of the law. The Jay Street Terminal has never subjected itself to the operation of the law since it never was authorized to construct and operate a railroad, and never held itself out to the public as a common carrier.

The situation here differs to such an extent from that presented to this Court in *Union Stock Yards Company, *sapra**, that the opinion there is not in point, but the present case is controlled rather by the decision of Judge Jackson in *K. & L. Bridge Company vs. L. & N. Railway Company*, 37 Fed. 567. There the Bridge Company sought to compel the defendant to interchange traffic with it on the ground that it was a connecting carrier. The Bridge Company was a corporation authorized by its charter to build a bridge and approaches thereto and to collect tolls for the use of such bridge by railroads, street cars, wagons, vehicles, animals and foot passengers, and for such purposes the bridge was a public thoroughfare. It solicited freight for railroad companies which it transported over its bridge. The bridge was also used by the Ohio and Mississippi Railway Company for the purpose of moving its freight from one side of the Ohio River to the other. It was held therein that the Bridge Company was neither by its charter, nor by the character of its services, a common carrier within the meaning of the Act to Regulate Commerce, and it was further held that when the bridge was used by the railroad company in connection with its line of railroad that it thereby became a part of that railroad and not a separate common carrier.

It would seem, if anything, that the Bridge Company, under the circumstances recited in the above case, partook more of the nature of a common carrier by railroad, within the meaning of the Act to Regulate Commerce than does the Jay Street Terminal. The services which it performed in connection with the transportation of goods in interstate commerce were practically identical with those performed by the Jay Street Terminal. The Bridge Company, however, was to a certain extent a common carrier in that it was authorized to construct a bridge to become a public highway or thoroughfare for the use of all who might make proper compensation therefor, and the tolls which it might charge for the use of its bridge were required by its charter to be reasonable. It differs from the Jay Street Terminal to the extent that it was in this sense a public service corporation owing certain duties to the public in return for certain privileges and franchises which it had received from the state.

POINT 2.

The Jay Street Terminal is not a railroad company within the meaning of the "commodities clause."

The next step in the Government's argument is that inasmuch "as Arbuckle Bros. operate one portion of the continuous railroad transportation from Brooklyn to western points, they are a railroad company within the meaning of the 'commodities clause,' to wit, they are a connecting carrier." (Page 19, Government's brief.)

It is submitted that the Jay Street Terminal is not a

railroad company within the meaning of the "commodities clause." The term "railroad company" is synonymous with the term "railroad corporation." It cannot have a broader meaning and we shall later show that as used in the "commodities clause" it does not cover what is sometimes conveyed by the phrase "railroad corporation." In arriving at the proper interpretation to be given to a phrase in one portion of the act, it is proper to refer to other portions of the same act. In Section 15 of the Act to Regulate Commerce as amended by the Act of June 18, 1910, it is provided, "And in establishing such through route, the commission shall not require any company without its consent to embrace in such route substantially less than the entire length of *its railroad* * * * * ;" and in the next paragraph it is provided, "In all cases where at the time of delivery of property to *any railroad corporation* being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided * * * * ;"

These uses of the word "company," "railroad," and "railroad corporation" where the subject matter is the same make it perfectly clear that Congress intended to give the term "railroad company" its technical and accurate meaning, namely, that of "railroad corporation."

It is submitted that this is strictly in accord with the general understanding as to the meaning of the phrase "railroad company."

It is said in *Holland v. Lynn & B. R. Co.*, 144 Mass. 425: "A 'railroad company' means a *corporation* which lays out, constructs, maintains, or operates a railroad operated by steam power, according to the express provi-

sions of Pub. St. c. 112." See *Chicago, M. & St. P. R. R. v. Wabash, St. L. & P. R. R.*, 61 Federal 993, where it is said: "A railroad company is a quasi *public corporation*, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service." See also *Randolph County v. Post*, 93 U. S. 502, where this court said: "A *corporation* which is given authority to construct, complete and operate a *railroad* between certain designated points, and to extend its road by lateral branches to connect with other branches, with the power of eminent domain, and to take and transport upon its road all persons and property, and fix such established rates of toll for such transportation, is a 'railroad company' within the meaning of Illinois statutes authorizing cities and counties to subscribe for stock in railroad companies."

It is true that the word "company" disassociated from the modifying adjective "railroad" is quite commonly used to include not only corporations, but co-partnerships and unincorporated associations, but the usual meaning of the word "company" used in connection with the modifying term "railroad" is ordinarily meant to convey the same meaning as the phrase "railroad corporation."

It is so used in the State of New York where a co-partnership or unincorporated association is not permitted by law to exercise the franchises of railroad corporations. See *Parker v. Elmira, Corning & Northern R. R. Co.*, 165 N. Y. 274. Jay Street Terminal is therefore not a "railroad company" in the State where it is located.

The laws of New York confer the franchises and privileges which are essential in the operation of a railroad only upon corporations duly organized under the Railroad Law

of that state. Before such corporation can exercise the powers conferred by law or begin the construction of its road, it is a condition precedent that such corporation obtain from the Public Service Commission of that state, formerly from the Board of Railroad Commissioners, a certificate that "public convenience and a necessity require the construction of said railroad as proposed in said certificate of incorporation." Section 9, Chapter 481, Laws of New York, 1910, being a substantial re-enactment of Section 59 of Chapter 676, Laws of New York, 1892.

The Jay Street Terminal is not a corporation organized either under the Railroad Law of the State of New York, or any other law of that State, but is a co-partnership. It filed its certificate of co-partnership and commenced to do business as the agent of these railroad companies prior to the creation of the Public Service Commissions in the State of New York, but being organized as a co-partnership it did not obtain a certificate of public convenience and a necessity from the Board of Railroad Commissioners, the predecessor of the Public Service Commission, nor did it comply with any provisions of the railroad law. Therefore it is not entitled to construct and operate a *railroad* as that term is used in the laws of the State of New York. It has none of the franchises and privileges which railroad companies derive from the laws of the State under which they have their being. It has no power of condemnation, no power to construct its tracks across public streets and highways. None of the privileges which are conferred by a state upon a public service corporation are vested in it and it owes none of the duties to the public which go hand in hand with such privileges and powers.

The legislative history of the amendment to the Act to Regulate Commerce, known as the "commodities clause,"

clearly indicates that it was the purpose of Congress not only to restrict the application of the phrase "railroad company" to a corporation, but to a corporation whose prime business was that of operating a railroad. The amendment as originally introduced in the Senate by Senator Elkins contained the term "common carrier," instead of the term "railroad company." See Congressional Record, Volume 40, part 7, pages 6455 and 6456. When this amendment was before the Senate it was pointed out by several of the Senators that the phrase "common carrier" would include manufacturing and mining corporations that had constructed railroads incidental to their other operations, inasmuch as such railroads were being used in the interstate transportation of commodities. It was partly to avoid the result of requiring such industrial corporations to divest themselves of their railroad operations that the language of the amendment was changed to the form in which it is now found in the act. Congressional Record, Vol. 40, part 7, pages 6563 to 6566.

It is submitted that the purpose of the "commodities clause" was to prevent railroad companies whose chief business was transportation from engaging in other enterprises to the detriment of the shipping public, and not to require corporations whose principal business was that of manufacturing or mining to give up the control of such railroad facilities as they might have acquired for the purpose of furthering their chief business.

Whatever the intent and purpose of this enactment may be it certainly cannot be given the construction contended for by the Government without doing violence to the language used therein. This clause is in its nature penal, for a violation thereof will subject the Jay Street Terminal to the penalties of Section 10 of the Act to Regulate Com-

merce. Therefore the term "railroad company" should receive a strict construction.

United States v. Harris, 177 U. S. 305.

Taggart v. Republic Iron & Steel Co., 141 Fed. 910.

There is more reason in this case to refrain from extending the obvious and natural meaning of the phrase "railroad company" than there was in the cases above cited because here the arrangement that exists between the Jay Street Terminal and the railroad companies is not one which was within the mind of Congress to prevent by the enactment of the "commodities clause"; on the contrary, at the same session Congress enacted the amendment to the Act to Regulate Commerce, specifically providing that a common carrier may make an arrangement with the owner of property whereby the owner renders a service connected with the transportation or furnishes an instrumentality to be used therein. (Section 15 of the Act to Regulate Commerce.)

The argument of the Solicitor-General must go so far as to entirely remove the word company from the "commodities clause." The "commodities clause" was enacted to divorce the rate-making power from the power of buying and selling merchandise. Messrs. Arbuckle and Jamison have nothing to do with making rates for east or westbound freight. The allegations of the petition is that the shipments of Arbuckle and Jamison are handled at the Terminal in the same way as other shipments "and the freight charges thereon are collected from the said Arbuckle and Jamison by the Jay Street Terminal *in accordance with the regularly published tariffs of your petitioners*" (Rec., p. 6).

The amount paid to the Terminal is not dependent on the freight rates, which are made solely by the railroad companies.

POINT 3.

The Hepburn Act specifically authorizes these appellees to make the arrangement in question with the Jay Street Terminal and to pay it for its services in transporting freight between Brooklyn and Jersey City.

Counsel for the Government contends that Section 15 of the Act to Regulate Commerce "authorizes a railroad to pay the shipper a just and reasonable allowance for two things only, to wit: (a) the use of some physical instrumentality such as private cars, etc.; (b) some incidental service ancillary to transportation, such as elevating grain, feeding and watering cattle, transferring freight from car to car in transit, etc.," but insists that this section "does not permit a payment for the transportation itself. It is then argued that inasmuch as Arbuckle Bros. perform the entire transportation service and furnish every instrumentality used in such service for a complete lineal section of the transportation, that therefore the arrangement between the railroad companies and the Jay Street Terminal is beyond the authorization of section 15, and is condemned by the "commodities clause."

In the first place, the Jay Street Terminal, or to use the appellation which is used by the Government, Arbuckle Brothers, do not furnish every instrumentality in connection with the transportation of commodities from their terminal in Brooklyn to the rail termini of these appellees. A very necessary instrumentality in such transportation service is furnished by the appellees, namely, the railroad cars in which the freight is carried.

It is submitted that the Act to Regulate Commerce furnishes no basis for this attempted distinction which is sought to be made by the Government between the conduct of the entire carriage by the shipper for a portion of the through transportation, and the rendering of "any service connected with transportation," or furnishing "any instrumentality used therein."

Congress at the same time that it made provision for the payment by a common carrier subject to the Act to the owner of property for the rendering of a transportation service or the furnishing of an instrumentality used therein, also defined what it intended to convey by the term "transportation." (See, 1.)

This definition clearly makes the services described by the Government as ancillary services, such as elevation, transfer from car to car in transit, etc., *transportation*. There is absolutely no reason, if the Government is correct, why all services defined as *transportation* by Section One must not be performed by the *railroad company* itself as distinguished from the owner of the property, or else the arrangement between the owner and the railroad company would result in a violation of the "commodities clause."

The practical deduction from the argument of the Government is that the amendment to Section 15 made by the Hepburn Act is absolutely destroyed by the other amendment to the Act to Regulate Commerce, known as the "commodities clause." The only way in which these two provisions of the Act can be construed so as not to conflict with each other is to consider the "commodities clause" as referring to the act of transportation in interstate commerce by a *railroad company*, in the ordinary sense, of goods owned by it at the time of the transportation or in which it has an interest direct or indirect. By using a

strained and unusual construction of the term "railroad company" as used in the "commodities clause" such as is contended for by the Government, ~~but~~ the conclusion is reached that no shipper may engage in the interstate transportation of his own commodities, a privilege which is specifically authorized by Section 15 of the Act.

This amendment to Section 15 by the Hepburn Act was the direct result of a request of the Interstate Commerce Commission who made the following recommendations in their 19th Annual Report dated December 14, 1905:

"Terminal roads, elevator charges and private cars:

There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such performance may take the form of an *excessive division* to a *terminal road* owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with prop-

erty rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the Commission should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate and any remedy is extremely difficult of application but nothing better appears to be available."

It will be noted that in this report the Commission associated together *terminal roads* and *excessive divisions of the rate* thereto, elevators and excessive elevator charges, private cars and excessive mileage upon the same when the terminal road, the elevator, and the private car were owned by the shipper, or the owner of the property transported. By this association of the facilities of transportation, it is clear that the Interstate Commerce Commission made no such distinction as is herein contended for by the Government. If it can be said that the arrangement with the Jay Street Terminal is within the condemnation of the "commodities clause," and not permitted by Section 15 of the Act, how can it be possible that Section 15 will permit the payment of a reasonable division of the through rate to a terminal railroad? Yet the Commission asked authority to determine that question in this report, and it is to be assumed that the Congress granted its request in its amendment to Sec. 15.

This amendment to Sec. 15 did not create new privileges

in favor of railroad carriers subject to the Interstate Commerce Act, but it extended the regulatory power of the Commission over arrangements between such carriers and shippers. Railroad companies have always had the right to employ others to perform a portion of the duties which they owe to the public.

Central Stock Yards Co. vs. L. & N. Ry. Co.,
118 Fed. Rep., 113; aff'd 192 U. S., 568.

Covington Stock Yards Co. vs. Keith, 139 U. S., 128; (and other cases cited on p. 62 of main brief).

If the contention of the Government is correct that lineal carriage is transportation which the carrier cannot farm out, then what becomes of all the existing arrangements between carriers and others who are not shippers, whereby a lineal portion of the transportation is performed for the railroad carrier; for example, the transfer of persons and baggage between railroads in Chicago by the Parmelee Company (12 I. C. C. Rep. 40), the transfer of freight across the waters of New York Harbor by hired lighters, the collection of less than carload freight in Washington by the Knox Express Co. (25 I. C. C. Rep. 411); the employment of terminal stations like the Brooklyn Eastern District Terminal, and the Bush Docks, etc.? Must all these arrangements cease because the service performed is a part of the lineal transportation as distinguished from the services termed by the Government ancillary services as elevation, refrigeration, etc.? Furthermore, if the Government is correct all these hired agencies while performing a portion of the lineal haul are railroad companies subject to the Act to regulate commerce and they must comply with all the provisions of said Act. They must

file and publish their tariffs, must make annual reports to the Commission, must keep their accounts in the manner prescribed by that body. They must join in through routes and make switch connections with lateral branch lines of railroad. They must post the name of their resident agent in every station where freight is received. They would be entitled to receive passes from other common carriers subject to the Act. They could not change their tariffs on less than 30 days notice, without special consent of Commission. The provisions of the Act would become absurd if applied to every agency employed by a railroad carrier to perform a part of the lineal transportation. Yet the Government's argument necessarily makes every such agency a common carrier by railroad and a railroad company within the meaning of the "commodities clause." There can be no distinction between such agencies and a shipper, when it comes to the question as to whether the performance of a portion of the lineal transportation creates a railroad company within the meaning of the "commodities clause."

If a sensible meaning be given to the term "railroad company" as used in that clause, no conflict can arise between that provision and the provision in Section 15 regulating the payment of allowances to shippers for transportation services.

POINT 4.

The order of the Commission cannot be sustained even if there be a violation of the "commodities clause." The equitable maxim "He who comes into equity must do so with clean hands", has no application whatsoever to this case.

The "commodities clause" forbids the interstate transportation by a railroad company of its own commodities. The order of the Commission directs the railroad companies, appellees, to desist from *paying* Arbuckle and Jamison unless they pay the Federal Sugar Co. It is not directed against Arbuckle and Jamison and that concern was not a party before the Commission.

In no respect does the order prohibit *transportation*, which is the subject matter of the "commodities clause." Either alternative of the order permits a continuance of a violation of that clause, as construed by the Government, since there is no direction in the order that Jay Street Terminal cease from transporting Arbuckle Brothers' sugar. The sole duty and power of the Commission, in case it ascertains that a provision of law which it is charged with the duty of administering is being violated, is to require the guilty party to cease and desist from the violation thereof, or to take other steps to prevent such continued violation. It has no power to direct or authorize the continuance of such violation on condition that a further violation of the same provision be perpetrated (See Brownell's main brief, pp. 60, 61, 81, 82, 93 and 94).

It is not contended that the railroad companies, appellees

who were the only railroad companies before the Commission are guilty of a violation of the "commodities clause." If Arbuckle and Jamison are a "railroad company" within that clause, the order is not directed to them, it does not prevent them from continuing to transport their goods in Interstate commerce. It does, under the theory of the Government, however, authorize the creation of another railroad company, namely the Federal Sugar Company, and the consequent violation of the "commodities clause" by that company, providing these appellees choose the alternative of employing that Company as their agent to perform a part of the lineal transportation. If there is any force to the Government's argument the decree of the Commerce Court should be affirmed because otherwise two violations will appear, while now there is only one.

From no possible view can the order of the Commission be sustained as directed toward the prevention of a continued violation of the "commodities clause." There is obviously no relation between such an order and the "commodities clause," and no reason why there should be. No suggestion was ever made to the Commission that there was a violation of said clause, nor was it suggested to the Commerce Court that the order should be sustained on that ground.

This brings us to the contention of the Solicitor-General that the order of the Commission should be sustained whether right or wrong, because of the equitable maxim that "He who comes into equity must do so with clean hands."

It is submitted that this principle of equity has no application in this case for the following reasons: First, the maxim applies to the petitioner seeking equitable relief,

and the railroad companies were not violating the "commodities clause" with respect to the subject matter of their petition.

Clarke vs. White, 12 Peters, 178, at p. 192.

The Solicitor-General is really urging that the railroad companies were in no position to apply to the Commerce Court and have no standing in this Court even as respondents for the reason that, although they stood charged before the Commission with *discrimination*, yet since it appears for the first time upon this appeal that respondents are guilty of entirely different malpractice, namely, a violation of the "commodities clause," therefore they cannot be heard upon the question whether or not there is any discrimination and whether or not the Commission acted beyond its powers in making the order which it did.

We might well rest upon the cases cited by the Solicitor-General himself to show that the matter of clean hands in the "commodities clause" has nothing to do with the matter of discrimination against the Federal Sugar Company.

For instance, in the case of *City of Chicago vs. Union Co.* (164 Ill., 224), cited by the Solicitor-General, it is stated:

"The wrong must have been done to the defendant himself and must have been in regard to the matter in litigation."

It is very apparent that neither of these requirements is met by the Solicitor-General's argument. In the first place no wrong to the *Federal Sugar Company* by the violation of the "commodities clause," if there be any violation, has been shown. Only the public are interested in such a penal prohibition as this, and any member of the public claiming special damage must at least be required

to show such damage. In the next place, the wrong is not "*in regard to the matter in litigation*," which is nothing more or less than the claim of the Federal Company to past damages and pay for future services to prevent an illegal discrimination between Arbuckle Brothers and the Federal Sugar Company.

Second, this maxim is a matter of defense which to be taken advantage of must be pleaded. It was not brought to the attention of the Commerce Court and therefore cannot be availed of by the appellant in this Court.

Pullman's Palace Car Co. vs. Central Transportation Co., 139 U. S., 62.

Badger vs. Roulett, 106 U. S., 255.

Bell vs. Bruen, 1 How., 69.

Newcomb vs. Wood, 97 U. S., 583.

The United States cannot urge that the railroads or Jay Street Terminal have committed iniquity and are barred from equity because of the violation of the "commodities clause." If the appellees are excluded from this Court though there will only be the appellants before it, the Court will still have to decide between the Solicitor General arguing that the Interstate carriage of Arbuckle sugar begins at Jay Street and Messrs. Farrell and Bigelow urging that it begins at the Jersey shore. The Commerce Court it is submitted will not be reversed unless its decree is founded in error. No such question as this was raised in the Commerce Court and it cannot be said that that tribunal erred in hearing these appellees.

Third, the application of this maxim lies within the discretion of the Court from which equitable relief is sought. As to matters properly within the discretion of

the Court of original equity jurisdiction, error is not assignable to this Court.

Taylor's Jurisdiction and Procedure of the
Supreme Court, pp. 605-606 and cases cited.

Fourth, the Commerce Court is not in its essential powers an equity court of original jurisdiction, but a special tribunal created by Act of Congress to act as an intermediate court of review in enforcing and annulling orders of the Commission. It has no power to grant relief from orders of the Commission on equitable grounds, but simply to review the same on questions of law.

Proctor & Gamble vs. United States, 225
U. S., p. 282.

United States vs. Baltimore & Ohio R. R. Co.,
225 U. S., p. 306.

The Solicitor-General overlooks the fact that this is really an appeal and not a proceeding to enforce an equitable right.

These Railroad Companies are reviewing in the only manner allowed by law, and really by appeal, an order of the Commission which they assert is plainly illegal beyond the powers of the Commission and not supported by a scintilla of evidence. Their right of appeal to the Courts by means of the present proceeding is secured to them under the statute *as matter of right* and not as matter of favor. They are not in the position of admitting that the order of the Commission was within its powers or legal and of asserting that certain extraneous facts and circumstances make the enforcement of this valid and legal order inequitable (if indeed such a position would be tenable), but are appealing from an order bad in its inception

and erroneous in form and theory, as is admitted by the Solicitor-General for the purposes of his argument upon this branch of the case.

Certainly the rule requiring one who resorts to equity to come "with clean hands" has no application where he relies, as in this case, upon his strictly *legal rights* and does not come asking the intervention of equity to protect him beyond the rights accorded him by the strict rules of common law. His only standing in the latter case to obtain relief in equity rests upon the ground that the common law works an injustice in his case, and if it appeared that he himself is doing injustice, of course there is reason for the application of the maxim.

Fifth.—The Solicitor-General overlooks the well-established rule that an order of the Commission must stand or fall as made, and neither the Commerce Court nor this Court has the right to make an order for the Commission.

Proctor & Gamble vs. U. S. (225 U. S., 282).

Especially is this true so far as the Government is concerned in this case when, as here, the Government took no steps to have the order set aside or modified in the Commerce Court either by original petition or intervention of any sort, so that the Government in this case stands strictly as an appellee upon any other appeal and of course cannot be heard to question the propriety or validity of any portion of the order.

No portion of the order of the Commission is appropriate to secure the result desired by the Solicitor-General. There is but one directory provision in the order, namely, that the railroad companies cease "from paying such allowance to Arbuckle Brothers on their sugar while at the same time paying no such allowance to said complainant (Fed-

eral Sugar Company) on its sugar;" which allowances **so** paid to Arbuckle Brothers are found to be "unduly discriminatory and in violation of the Act to regulate commerce."

Certainly this Court after its decision in the *Proctor & Gamble* case (*supra*) will not be led into making an order for the Commission in the form and upon the theory which it believes to have been the proper one.

This Court is really asked to sustain an order which sanctions an illegal practice for the reason that the persons to whom the order is directed are now guilty of the same illegal practice.

Conclusion.

It is submitted that this twelfth hour contention of the Government should not be given consideration on this appeal. If there is any merit in the point that the agencies which perform a portion of the lineal transportation become *ipso facto* railroad companies within the condemnation of the "commodities clause" if they transport their own goods, the Government is not foreclosed from raising the same in a direct proceeding against Arbuckle Bros. or any like agency of the carriers. There are too many varied interests within the Government's sweeping definition of the term "railroad company" who have had no hearing, if the question is to be disposed of in a case where no consideration has been given to the subject, either by the Commission or the Commerce Court.

Furthermore, if the order of the Commission is to be sustained on the theory of the Government, it will seriously injure an intervening petitioner which has no connection with any shipper. We refer to the Brooklyn Eastern District Terminal. That concern will lose the tremendous

business of the American Sugar Refining Company, for the Commission's order would in effect require the payment to that sugar company of the same allowances as are directed to be paid to the Federal Sugar Refining Company. There can be no doubt but that the American Sugar Refining Company would undertake to bring itself within the effect of the order, by lightening its own sugar, for it could make money by so doing. Thus the order of the Commission if sustained would work an injury to the Brooklyn Eastern District Terminal, by authorizing the creation of another railroad company, with the consequent violation of the "commodities clause." If the argument of the Government is sound, it furnishes excellent ground for an affirmance of the Commerce Court's decree.

The decree of the Commerce Court should be affirmed.

GEORGE F. BROWNELL,
Solicitor for Railroad Companies.

WILLIAM N. DYKMAN,
Solicitor for Arbuckle and Jamison.

H. B. CLOSSON,
Solicitor for Brooklyn Eastern
District Terminal.

UNITED STATES *v.* BALTIMORE & OHIO RAIL-
ROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 385. Argued January 16, 17, 1913.—Decided December 1, 1913.

Premises occupied and used by a common carrier as a depot or freight station may become such through contract with the owners and not necessarily by lease **or** purchase.

The fact that the carrier leases a terminal from a shipper near that shipper's establishments does not, in the absence of any fraudulent intent, import a discrimination in favor of that shipper where the

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station is actually used for the benefit alike of all shippers in that neighborhood.

A carrier may compensate a shipper for services rendered and instrumentalities furnished in connection with its own shipments; and if the amount is reasonable it is not a prohibited rebate or discrimination, even if the carrier does not allow other shippers to render and furnish similar services and instrumentalities and compensate them therefor.

Because a contract for terminal facilities contemplates and provides for the publication of joint tariffs does not make the owners of the terminal common carriers if no joint tariffs are ever filed or published.

Where the Interstate Commerce Commission held payments for shippers' services rendered and facilities furnished to be discriminatory only in so far as similar payments for similar services are not paid to other shippers, other questions as to the legality of such payments which were not passed on by the Commission or the Commerce Court are not properly before this court and will not be passed on.

Quare, and not now discussed or decided, whether a shipper furnishing lighterage service within lighterage limits for a part of the rate becomes a common carrier and debarred from transporting his own goods under the commodity clause of the Act to Regulate Commerce. A shipper may be under disadvantages in regard to his shipments by a common carrier by reason of his disadvantageous location.

200 Fed. Rep. 779, affirmed.

THE facts, which involve the legality of an order made by the Interstate Commerce Commission regarding certain allowances made by railroad carriers to shippers and determination of whether such allowances constituted illegal preferences or discriminations in violation of the Act to Regulate Commerce, are stated in the opinion.

Mr. Solicitor General Bullitt for the United States:

Arbuckle Brothers in operating the Jay Street Terminal and in transporting freight by floats, etc., between Brooklyn and Jersey City are an integral part of the through trunk line systems operating into and out of greater New York, and as such are common carriers by railroad, and are subject to the Interstate Commerce Act. *United*

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States v. Union Stock Yard, 226 U. S. 286, 302, 304, 306; *United States v. Del. & Hud. Co.*, 213 U. S. 366.

The Hepburn Act does not authorize the railroads to make the arrangement in question with Arbuckle Bros. and to pay them for their services in transporting freight between Brooklyn and Jersey City. *Int. Comm. Comm. v. Difffenbaugh*, 222 U. S. 42; *Un. Pac. R. R. v. Updike Grain Co.*, 222 U. S. 215.

Mr. P. J. Farrell for the Interstate Commerce Commission:

The Commission correctly treated as one and the same concern the firm of Arbuckle Brothers and the firm styled Jay Street Terminal.

The fact that a large part of Arbuckle Brothers' sugar is sold f. o. b. Brooklyn is a matter of no importance.

The allowances are paid to Arbuckle Brothers in accordance with tariffs published and contracts entered into by the carriers. The fact that the allowances cover use of the Jay Street Terminal and all services performed there in connection with the transportation of the shipments does not change the character of the discrimination.

By confusing allowances paid to Arbuckle Brothers on their shipments of sugar with allowances paid to them on other shipments the carriers cannot make lawful a discrimination which would otherwise be unlawful.

The fact that bills of lading issued by the carriers show that their responsibility for the Federal Sugar Refining Company shipments begins at the Jersey shore is not, as between such shipments and those of Arbuckle Brothers, a matter of importance.

The right of the carriers to discriminate between Arbuckle Brothers and the Federal Sugar Refining Company does not depend upon the question of whether the latter changed its method of shipping to avoid such discrimination.

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The carriers' offer to lighter the Federal Sugar Refining Company shipments from Pier 24 to the Jersey shore free of expense to that company does not change the character of the discrimination which forms the basis of the Commission's order.

The lawfulness of the discrimination does not depend upon the question of whether the allowances paid to Arbuckle Brothers are more than reasonable compensation for the services performed by them in delivering their shipments of sugar on the Jersey shore.

The court erred in stamping with the seal of good faith the contracts made with the Jay Street Terminal for the purpose of giving Arbuckle Brothers an advantage over the Federal Sugar Refining Company and denouncing as a subterfuge the change in shipping arrangements made by the latter company to remove the discrimination thus brought about.

In support of these contentions see *Gulf, Col. &c. Ry. Co. v. Texas*, 204 U. S. 403; *Int. Com. Com. v. Balt. & Ohio R. R. Co.*, 145 U. S. 263; *Un. Pac. Ry. Co. v. Goodridge*, 149 U. S. 680; *Cin., N. O. & Texas Pac. Ry. Co. v. Int. Com. Com.*, 162 U. S. 184; *Tex. Pac. Ry. Co. v. Int. Com. Com.*, 162 U. S. 197; *Int. Com. Com. v. Cin., N. O. & Tex. Pac. Ry. Co.*, 167 U. S. 479; *Wight v. United States*, 167 U. S. 512; *Int. Com. Com. v. Alabama Midland Ry. Co.*, 168 U. S. 144; *East Tenn., V. & G. Ry. Co. v. Int. Com. Com.*, 181 U. S. 1; *New Haven R. R. Co. v. Int. Com. Com.*, 200 U. S. 361; *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Int. Com. Com. v. Ch. G. West. Ry. Co.*, 209 U. S. 108; *Int. Com. Com. v. Ill. Cent. R. R. Co.*, 215 U. S. 452; *Int. Com. Com. v. Del., Lack. & West. R. R. Co.*, 220 U. S. 235; *Un. Pac. R. R. Co. v. Updike Grain Co.*, 222 U. S. 215.

Mr. Ernest A. Bigelow for the Federal Sugar Refining Company:

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The present arrangement between the carriers and Arbuckle and Jamison is a fraud upon the spirit and the intent and the letter of the acts to regulate commerce. The arrangement had its origin in a flagrantly unlawful preference of these great shippers and was devised to perpetuate such preference.

The form is the form of an innocent contract between a carrier and a dock and lighterage concern; the substance is that of an unlawful and unjust preference of one group of shippers as against their competitor.

Underlying the arrangement with these favored shippers is the fundamental purpose to handicap the independent company and prevent it from entering the markets on equal terms, *i. e.*, to defeat the intention of Congress as manifested in the Act to Regulate Commerce. The lighterage limits could be expanded at will, in all directions, north, east and south, but never to Yonkers, for there was located the Federal's refinery.

The Commission's findings of fact, supported as they are by the evidence, will not be reviewed by this court, and its conclusions of law were correctly drawn.

So far as the conclusions embody findings of fact they appear not to be reviewable by the courts. A finding that there is unjust discrimination is a conclusion of fact. *Int. Com. Com. v. D., L. & W. R. R. Co.*, 220 U. S. 235.

The transportation referred to in § 2 of the act does not begin until the lighters are made fast to their float-bridges on the New Jersey shore, that being the point of time at which the carriers accept the goods and assume responsibility therefor. *Mo. Pac. Ry. v. McFadden*, 154 U. S. 155; *L. & L. Fire Ins. Co. v. R. W. & O. R.*, 144 N. Y. 200; *Coe v. Errol*, 116 U. S. 517, 528.

The single fact that Arbuckle and Jamison issue to themselves bills of lading in the name of the carriers does not suffice to overcome the legal conclusion arising from the fact that the sugar remains in their own possession and

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at their own expense and risk until the lighters have made fast at the rail terminals.

On the first proposition, therefore, it is submitted the Commission has correctly disposed of the question of law, and that its finding that the arrangement between Arbuckle and Jamison and the carriers creates an unlawful discrimination, being a finding of fact which is supported by the evidence and as such not reviewable by the courts, should be accepted by this tribunal.

The Commission was right in finding that both shippers perform precisely the same service in lightering their respective shipments from points within the lighterage limits and delivering them to the appellee carriers at their rail terminals. If, therefore, the service performed by Arbuckle and Jamison be a part of the transportation, within the scope of § 15, so also must be the service performed by the Federal Company and to pay to Arbuckle and Jamison an allowance for their services and to refuse to pay the Federal Company for its precisely similar services is to discriminate unlawfully. *Int. Com. Com. v. Dissenbaugh*, 222 U. S. 42; *Union Pac. Ry. v. Updike Grain Co.*, 222 U. S. 215.

The Federal Company initiates the interstate transportation of its sugar, so far as these carriers are concerned, at pier 24, a point within the lighterage limits. This is true even if Federal sugar is not discharged from the lighters at pier 24 and there is, therefore, no physical delivery. *Gulf, C. & S. F. Ry. v. Texas*, 204 U. S. 403.

The Federal Sugar Refining Company has no apologies to offer for adopting the expedient of rebilling at pier 24, an expedient which has received the sanction of this court in *Gulf, C. & S. F. Ry. v. Texas*, 204 U. S. 403.

As to the propriety of motives, a shipper is entitled to accommodate its conduct to settled principles of law, even though it be impelled thereto by an enlightened self-interest.

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The so-called admission by counsel for the Federal Sugar Refining Company did not admit, at least in the sense ascribed to it by the dissenting Commissioners; and, in any event, is quite immaterial, as the Commission has power in the public interests to consider the whole subject, disembarrassed by any supposed admissions, even if contained in the statement of complaint. *C. H. & D. Ry. v. Int. Com. Com.*, 206 U. S. 142, 149.

Mr. George F. Brownell, with whom *Mr. H. A. Taylor* was on the brief, for the Railroad Companies, appellees.

Mr. H. B. Closson for the Brooklyn Eastern District Terminal, appellee.

Mr. William N. Dykman for the Jay Street Terminal and Arbuckle Brothers, appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

This appeal involves the legality of an order made by the Interstate Commerce Commission holding that certain allowances made by the appellees to Arbuckle Brothers on sugar shipped by them over one or another of the railroad companies' lines constitute an illegal preference or discrimination in violation of the Act to Regulate Commerce. The order of the Commission required the railroad companies to cease and desist from paying such allowances, "while at the same time paying no such allowances to the Federal Sugar Refining Co.," on its sugar brought by it on lighters to the carriers at the same rail terminals. 20 I. C. C. Rep. 200. The carriers affected filed a bill in the Commerce Court alleging the invalidity and illegality of the order, and sought an injunction *pendente lite* and a permanent injunction against its enforcement. An injunction until the cause could be finally heard was granted

by the Commerce Court. This was appealed from by the United States and the injunction sustained as within the sound discretion of the court below. 225 U. S. 306. Thereupon the cause was finally heard upon motion of the appellants to dismiss the bill for want of equity, all answers and pleas theretofore filed having been withdrawn. The Commerce Court denied this motion and sustained the equity of the bill. The appellants declining to further defend, the temporary injunction was made permanent. From that decree this appeal is prosecuted.

The situation out of which the questions for decision arise, shortly stated, is this:

The railroad companies held by the Interstate Commerce Commission to have discriminated in favor of Arbuckle Brothers and against the Federal Sugar Refining Company, are interstate trunk lines whose freight rail terminals are at the New Jersey shore of the harbor of New York. Transportation of freights into and out of the City of New York is practicable only by means of car floats, barges and steam lighters, operating between the city and the New Jersey shore.

To meet this condition the appellee railroads have long held themselves out as extending transportation of freights bound east to a defined area along the river front of the city and as beginning such transportation west-bound when freight is delivered at designated points within the same area. The necessary lighterage service is performed without additional cost or charge, the flat rate into or out from such points being identical with that applicable at the New Jersey rail terminals. The limits within which such lighterage service is performed as a part of the transportation assumed have long been defined and published in the several filed rate sheets of the carriers. The district embraces substantially the commercial and manufacturing river front of Greater New York, and within it the railroads hold themselves out as undertaking

to receive or deliver freight at any public dock, or at any accessible private dock where the shipper shall arrange for the use of the dock. Within this lighterage zone each of the appellees has established and long maintained public freight terminal stations, at which it will deliver east-bound freights and receive freights bound west. Some of these stations are owned or managed solely by one of the railroads and some are union stations operated for the joint use of two or all of the railroads. Some of them are operated by third persons, who manage and operate them under contracts as agents for one or more of the railroads. But whether operated under contract or directly by the company or companies using them they are represented to be public delivery and receiving stations, and are so set out in the filed tariff sheets of the companies interested.

The "allowance" to Arbuckle Brothers referred to in the order of the Commission is the consideration paid by the railroad companies to them for instrumentalities and facilities furnished and services performed in the maintenance of one of these public stations, known as the Jay Street Terminal, and for the lighterage of all freight between that station and the railroad terminals on the New Jersey shore. Arbuckle Brothers, a co-partnership, are large refiners of sugar and dealers in coffee. Much of their product of sugar finds a market in the west at points upon the lines of the railroads here involved. Their refinery is upon the water front of Brooklyn. They also own a contiguous property fronting upon East River some 1,200 feet. Upon this property they have erected a dock, piers and large warehouses for the receipt of freight intended for transportation to the railroad terminals on the New Jersey shore, or received from such terminals for consignees nearby. They also own steam lighters, car floats, barges, etc., constructed for the transfer of cars, loaded or unloaded, between this dock and the New Jersey terminals. The premises were peculiarly adapted for use

as a public union freight station, and for the purpose of extending transportation by their several lines to this portion of the commercial and manufacturing water front of Greater New York, the appellee railroad companies, in 1906, entered into separate, but identical, contracts with Arbuckle Brothers, the latter contracting under the business name and style of "The Terminal Company." The contracts are too lengthy to be set out. Their essential points may be thus summarized:

1. The Terminal Company agrees to maintain the premises in good order and condition for the receipt of freight and to provide all necessary boats, car floats, docks and piers, adequate at all times to receive, discharge, transfer and deliver freights, loaded and unloaded, adequate to accommodate the business contemplated.

2. The Terminal Company will receive at the New Jersey terminals all freights, in or out of cars, intended for delivery at the aforesaid freight station and safely convey the same to the premises and there make delivery to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of any of said railroad companies and carry and deliver the same to said railroad company's New Jersey rail terminals.

3. For the facilities supplied and the services performed each of the railroad companies agrees to pay on freight in and out of the station, a compensation measured by the tonnage handled for each such railroad of four and one-fifth cents per hundred pounds on freight originating at or destined to points west of what is called "trunk line territory," and on freight originating at or destined to points east thereof, three cents per hundred pounds.

Under these contracts, consignments to or by Arbuckle Brothers are handled in the same manner as the shipments of the general public, and comprise a part of the tonnage

in and out of that station by which the compensation paid to the Terminal Company is measured. This fact was the basis of the complaint made by the Federal Sugar Refining Company, whose sugar seeks the same market, and who claimed that as it lightered its sugar from its own shipping dock to the terminals at the New Jersey shore the so-called "allowance" made in respect to the sugar of Arbuckle Brothers handled under the contracts referred to above, was an unjust and an illegal discrimination unless a like allowance was made to it.

The order of the Commission does not forbid the allowance to Arbuckle Brothers as in itself illegal or unreasonable, but forbids it only as a discrimination unless a like allowance is made to the Federal Sugar Refining Company. That there is no undue discrimination against the Federal Sugar Refining Company in refusing to make a like allowance to it will appear when the conceded circumstances and conditions are considered. This latter company is a competitor of Arbuckle Brothers in the sale and shipment of sugar to the same markets. Its refinery is located at Yonkers on the Hudson River, a point some ten miles beyond the limits of the free lighterage district. It owns its docks and piers upon the river, but has never enjoyed the free lighterage privilege accorded to all shippers from docks and piers inside the free zone under the tariff sheets of the carriers. It has therefore been compelled to furnish its own means for lightering shipments from its docks to the New Jersey shore. This is an undoubted disadvantage in competing with Arbuckle Brothers, as well as with all other refiners and shippers of sugar within the lighterage district. For many years it had an arrangement with the Ben Franklin Transportation Company, an independent transportation company, by which the latter transported its sugar directly from its Yonkers dock to the railway terminals on the New Jersey shore. There it was delivered to one of the appellees and a bill of lading

signed. The freight rates under such bills were identical with the flat rate from stations and piers within the free lighterage district. This disadvantage arising from its location was made the subject of a prior complaint before the Commission, wherein it sought to have the free lighterage district extended so as to include its Yonkers docks, or to have an allowance made to it for the transportation of its sugar from its dock to the New Jersey terminals. Such relief would have removed the disadvantage under which it had long labored. But this relief was denied and its petition dismissed without prejudice. In that proceeding it was ruled by the Commission that the free lighterage arrangements theretofore made by the carriers were the only available means by which they could extend their lines to New York and were not forbidden by the Commerce Act, and that by such extension the carriers had come under no obligation to extend the district to Yonkers. It was also ruled that the service rendered by Arbuckle Brothers in the lighterage of their own sugar from the Jay Street Terminal to the New Jersey shore was a service in aid of transportation and that for the instrumentalities and services, under the very contracts here involved, they did not receive an unreasonable consideration. 17 I. C. C. Rep. 40.

After the promulgation of that opinion the methods adopted for delivering sugar from the Yonkers dock to the New Jersey terminals were changed. The manager of the company's city office at 138 Front Street, would notify the manager of the refinery at Yonkers every morning of the sugar necessary to fill accepted orders. This necessary sugar was then loaded at the Yonkers dock upon the lighter Ben Johnson just as before. For this sugar the master of the lighter gave a receipt and was handed a document showing the Federal Sugar Refining Company to be the consignor and the consignee its city office, 138 Front Street. This document also gave the

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number, weight and description of the packages. The Ben Johnson would then go down the river to pier No. 24, within the free lighterage district, where the boat tied up, and the city office was notified, "thereupon," say the Commission, "the complainant issues shipping instructions to the transportation company and hands to its representative bills of lading for execution by the carrier upon delivery at the New Jersey shore." The lighter then proceeds to the Jersey shore where the sugar is delivered to the carrier and the blank bills of lading are signed and returned to the lighter's captain. For the service of the lighter in taking the sugar to pier 24 and then across the river to the railroad terminals, it is paid three cents per hundred pounds. The claim upon these facts was and is that unless an allowance is made to it identical with that made to Arbuckle Brothers for their service in respect to their own shipments of sugar, a discrimination unlawful in character will result. And this was the conclusion of the Commission.

The Commerce Court was of opinion that the circumstances and conditions were so dissimilar as not to make the same rule applicable and that the result reached by the Commission was based upon manifest errors of law.

That pier 24 is within the free lighterage district and that the defendant carriers held themselves out as ready to take freight at any public or accessible private dock within that zone and lighter it across the river without any other charge than that published in their tariff sheets applicable alike to freight delivered to them at such dock or pier or at the New Jersey shore, is conceded. But the carriers have not established any public station at pier 24 and the Federal Company did not notify them, nor make any tender to them at that pier of their sugar for transportation. If such sugar had been tendered to them there and they had refused to receive it and lighter it at their own cost across the river, a very different ques-

tion would have arisen. That such tender was not made was obviously due to the fact that the sugar when loaded on the Ben Johnson at their Yonkers dock was destined for the railroad terminals at the New Jersey shore and thence by rail to the real consignee, the purchaser of the sugar at western points on the carriers' lines. The sugar had been sold before it was loaded at Yonkers and the stopping at this pier and the receipt of unsigned bills of lading showing the consignees and destinations was, as the Commerce Court held, not a break in the continuity of the transportation, but a plain subterfuge to give the transaction the appearance of a shipment from pier 24. We agree with the Commerce Court and the minority of the Commission in thinking that the change in method after the failure to obtain relief in the first case did not change the substance of the transaction in point of law or fact. The claim by the Federal Company is a claim for an allowance on account of lightering done for their own convenience, a lighterage service which under the facts of the case the carriers were under no obligation to do as a duty of transportation. It was, therefore, a demand for a purely accessorial service, as much so as if they had claimed for carting their shipments to a depot or station.

Assuming then, that the lighterage service performed by the Federal Sugar Refining Company was a service by it for its own convenience for which the railroads were under no obligation to make compensation, we come to the question whether the facilities employed and the service performed by Arbuckle Brothers in respect to their own sugar after delivery at the Jay Street Terminal are accessorial, or services in aid of railroad transportation for which they may be paid a reasonable compensation without discriminating unduly against the Federal Sugar Refining Company.

That the plain purpose of the contracts between the

several railroad companies and the Terminal Company was to constitute the dock and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners and not by virtue of a fee simple title or a lease is of no legal significance. *Railroad Commission of Kentucky v. L. & N. Railroad*, 10 I. C. C. Rep. 173, 175; *Cattle Association v. C., B. & Q. Railway*, 11 I. C. C. Rep. 277. Nor is there the slightest substantial evidence that in the selection of the premises of Arbuckle Brothers there was any purpose to give them as large nearby shippers any preference or to unduly discriminate against competing sugar refineries. The premises were ideally adapted to meet the necessities of the great manufacturing and commercial business interests along the river front of Brooklyn and constituted the only property reasonably obtainable by the railroads for the extension of their lines of transportation to the Brooklyn side of East River. That through instrumentalities furnished by the Terminal Company and the service by it performed transportation by the railroads begins and ends at this station, is most obvious. This continuity of transportation is not questioned by the brief for the United States in this case. Thus, after referring to the instrumentalities furnished and the services performed by the Terminal Company, it is said, "in connection with the further fact that all of the railroad companies make through rates from Brooklyn and New York to western points covering (1) the service performed by Arbuckle Bros., and (2) the transportation by rail from Jersey City westward, show such a continuity of transportation as to render argument unnecessary that the transportation from Brooklyn to western points is by one continuous transportation by railroad. The mere fact that the physical rails stop at Jersey City does not mean that the railroad transportation there ends. It continues over to

Brooklyn by means of car floats, upon which further rails are laid and on which empty and loaded freight cars stand and are transported, so that the rails upon the car floats are brought into contact with the rail ends at Jersey City and the continuation thereof at Brooklyn, and in this way the transportation by railroad is carried on without interruption from the western points directly to Brooklyn."

It is true that this clear admission by the Solicitor General is made for the purpose of establishing a contention he makes, namely, that Arbuckle Brothers under the name of the Terminal Company are in law and fact common carriers by railroad who violate the commodity clause of the Hepburn Act by transporting their own products, a view to which we later refer. The concession as to the continuity of common carrier transportation by railroad from and to this station under the published freight tariffs which include the services performed by the Terminal Company is not inconsistent with the view of the Commission, so far as transportation to and from that station is confined to the shipments made to or by one of the general public. Thus the Commission say: "So far as the general public is concerned the Arbuckle dock may doubtless be regarded as a public receiving station of the defendant." It is said further: "Arbuckle Bros., not only operate their station for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular station of the defendants on the west shore."

The order of the Commission is made to rest upon an erroneous assumption that the services performed by Arbuckle Brothers in respect of their own westbound shipments of sugar after the delivery of such sugar at this station is a shipper's service done for their convenience, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensa-

tion unless a similar compensation is allowed to the Federal Sugar Refining Company for the lighterage of its sugar to the west shore railroad terminals.

That certain advantages enured to Arbuckle Brothers from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost, is obvious. That this was a consideration which operated as an inducement to make these contracts, may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station. That they were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers, may also be conceded. But these were business considerations which are far from showing any purpose to give them any illegal preference or to discriminate against other shippers. That the station constituted a great public utility by which the shipping public was served is too plain for argument. Although nearly one-third of all westbound shipments through that station were made by Arbuckle Brothers, the remaining two-thirds of the tonnage was furnished by the general public. Thus, the uncontradicted averment of the bill is that during the first six months of 1907 the shipments of general merchandise through that station numbered 92,622 of which more than 85,000 were by shippers other than Arbuckle Brothers, though the tonnage of the latter aggregated nearly one-third of the total. Thus it is demonstrated that while Arbuckle Brothers are by far the largest shippers, yet the advantages of the station are availed of by thousands of the general public.

Upon all of the conceded facts of the case, we must conclude that the contracts by virtue of which the premises owned by Arbuckle Brothers were converted into a public freight station under their management as agents for the

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several carrier lines were contracts made in good faith and not as a cover for any fraudulent scheme to give rebates or any other illegal advantage. The case must turn here, as it did before the Commission and in the Commerce Court, upon the question whether the allowance to Arbuckle Brothers of compensation upon their own shipments was for instrumentalities and services accessorial in character. Thus the Commission say (20 I. C. C. 209):

"The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle their sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employés that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants, with respect to the sugar of Arbuckle Brothers, until the defendants have actually received it at their regular freight stations west of the river. Yet it is here contended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled, however, by the face of these documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers, if, as seems to

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be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers, up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers."

We must now recur to the distinction drawn by the Commission between the compensation paid by the railroad companies to Arbuckle Brothers for the instrumentalities furnished and the service performed by them in respect of their own westbound shipments of sugar, and the compensation paid to them in respect to the freight handled by them through their station for the general public. The Commission find no fault with reference to the compensation paid for the latter but do find that the compensation paid for the former is an undue discrimination unless a like compensation is made to the Federal Sugar Refining Company for the lighterage of its sugar.

We have before noticed that the order of the Commission is in the alternative. The obvious inference is that the Commission found nothing unlawful *per se*, in the compensation paid to Arbuckle Brothers under the contract, although they are compensated upon a gross tonnage which includes their own sugar, for it sanctions its continuance upon condition that a like allowance shall be paid upon the sugar lightered by the Federal Sugar Refining Company. *Penn. Refining Co. v. Railroad*, 208 U. S. 208, 218.

But, as has already been shown the railroads were

under no obligation to lighter the sugar of the Federal Sugar Refining Company. Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. *Wight v. United States*, 167 U. S. 512; *General Electric Company v. New York Central Railroad*, 14 I. C. C. Rep. 237; *Interstate Commerce Commission v. Difffenbaugh*, 222 U. S. 42, 46. In the case last cited, it is said:

" . . . the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

This principle is not controverted, but the Commission failed to give it application, because, as shown in the excerpt from its report set out above, it construed this relation of Arbuckle Brothers, under the terms of the contract, in respect of their own shipments of sugar, "as that of shipper up to the moment of time when they physically deliver their sugar to the defendants at the Jersey shore." Again the Commission say, that, "the

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contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk and only until that moment does the carrier's risk begin," etc. Of course, if this was the case, their services up to the time of delivery at the New Jersey shore, were shipper's services, purely accessorial, and not connected with or in aid of transportation by the railroad, and, therefore, a discrimination would result unless a like allowance was made to the Federal Sugar Refining Company. But this construction of the contract has no other basis than appears in the clause defining the responsibility of the Terminal Company to the contracting carriers while the freights remain in the Terminal Company's physical possession. That clause (3d) reads thus:

"The responsibility of said Terminal Company for eastwardly bound cars and the freights therein shall begin when the cars are placed upon its floats at the said float bridges at the aforesaid station of said Railroad Company, and shall continue as respects the cars until they have been returned by it, loaded or empty; and as respects the freights contained in eastwardly bound cars, its responsibility shall continue until the actual delivery thereof to and acceptance by the consignees at Brooklyn. As respects the freights to be transported westbound, said Terminal Company's responsibility shall commence at the time the same is received from the consignor at its aforesaid premises, and shall continue until said freights, loaded into cars, have been brought to the float bridge of said Railroad Company at its aforesaid freight station and until the floats have been attached to the float bridge and the cars are in complete readiness for removal from the car floats by said Railroad Company."

That clause deals both with east and westbound freight and covers both the freight and the cars of the railroad company. It is too plain for argument that its only purpose is to fix the responsibility upon the contracting com-

pany for both the ears of the carrier and the freight of all shippers while in its physical possession. The liability imposed is between agent and principal and is substantially that imposed by general principles of law. It is plainly not intended to affect the responsibility of the carriers to all shippers after the receipt of freight for transportation, a responsibility which they hold themselves out as assuming by their published tariff sheets.

The contracts between the carriers and the Terminal Company make no distinction whatever between the duty and obligation of the latter company in respect to the shipments of Arbuckle Brothers as sugar refiners, and those made through their station by the general public. Nor was there any distinction recognized by the undisputed course of business under the contracts. When the shipments of Arbuckle Brothers were delivered at the station, carriers' bills of lading were then signed and delivered just as in the case of freight delivered by the general public. If carrier responsibility began at that station for the shipments of the public, it also began as to the freight there received from Arbuckle Brothers. The physical possession of the Arbuckle sugar, as stated by the Commission, remained with them until actually placed in the possession of the carrier on the New Jersey shore. But that is equally true as to the shipments of the general public. In both cases, however, the possession after such delivery and until delivered at the New Jersey shore was, under the contract, that of Arbuckle Brothers, under the business name of the Terminal Company, as agents of the carrier over whose lines the freight was routed and whose bill of lading had been duly issued. The Commission, while seeming to recognize this relation of agency, in effect deny it as to the freight received and received for at the station if it constituted a shipment by Arbuckle Brothers. But neither the words, nor the purpose of the contract, nor the actual method of conducting

the business, furnish the slightest reason for any such distinction as that drawn by the Commission. All freight, both in and out of the station, was handled in the same way.

The suggestion in the brief of the Solicitor General for the United States that "joint published tariffs are issued by the railroads and Arbuckle Bros.," has no other foundation of fact than that found in the seventh paragraph of the contract between the Erie Railroad and the Terminal Company, where it is said, that the Terminal Company, "shall not be required to receive or carry any freight which may from time to time be classed as prohibited freights in the joint published tariffs of itself and the railroad company." But there is not a scintilla of evidence that any such joint published tariffs have ever been filed or published, nor that the Terminal Company has ever published or been required to file any tariff sheets whatever. The filed tariff sheets showing the services performed by Arbuckle Brothers, and the facilities provided for extending transportation between the New Jersey terminals and this station, are those published and filed by the railroad companies, who thereby hold themselves out as common carriers to and from this station. That it might originally have been expected that the Terminal Company might join in such published tariffs is possible. That it never did, is plain.

To say that the "allowance" made to Arbuckle Brothers is an allowance for lightering their own sugar across the river is to only half state the case. This so-called allowance is not only for such lighterage service, but is also compensation for the use of all of the terminal properties, docks, warehouses, tracks, steam lighters, car floats and every instrumentality used under the contract. It includes the services and responsibility of Arbuckle Brothers, as agents for the several lessees using the station, and their staff of employés engaged in receiving, delivering,

loading and unloading freights thus received, both incoming and outgoing. As the measure of compensation is the tonnage in and out of the station and as this compensation is paid by the several railroads maintaining the station in proportion to the tonnage which they severally handle, there is a sense in which it is in part an allowance to Arbuckle Brothers upon their own shipments. But they receive the same compensation upon the tonnage of every other shipper through that station, and it is the aggregate of the compensation which must determine the reasonableness of the allowance when we come to deal with it as an allowance to them for services or instrumentalities furnished, under § 15 of the Act to Regulate Commerce.

That the compensation of three and four and one-fifth cents per hundred pounds upon the total tonnage in and out of this station is not unreasonable was and is not challenged, and therefore we pass that subject by.

The contention to which we have hitherto referred that the arrangement made by the Terminal Company violates the commodity clause of the Act to Regulate Commerce is not necessary to be considered. There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause. Indeed, the order permitted the continuance of the Jay Street Terminal and the business there conducted, providing only that like rights and allowances were made to the Federal Sugar Refining Company. The order, therefore, cannot be assumed to have contemplated that the Jay Street Terminal business was a violation of the commodity clause, since under that hypothesis the conclusion would be inevitable that the Commission by its order gave sanction to and permitted the continuance of the wrong which its powers were exerted to suppress. As we do not consider the conten-

tions concerning the commodity clause as properly arising for decision and hence do not pass on them, they are not foreclosed, and hence our action in this case will be without prejudice to the right to assert them in the future if those having the right to do so are so advised.

Viewing the whole case in a broad light, it is apparent that the disadvantage under which the Federal Sugar Refining Company labors is one which arises out of its disadvantageous location. That disadvantage would still remain if the title to the Jay Street station was in the railroad companies, and its business in charge of a third person.

We fail to find any error in the decree of the Commerce Court holding the order of the Commission void, and its decree is accordingly approved.
